

CONFIDENTIAL.

GOVERNMENT OF INDIA.
LEGISLATIVE DEPARTMENT.

A
COLLECTION
OF
NOTES AND MINUTES

BY
THE HONOURABLE SIR GEORGE LOWNDES, K.C.S.I., K.C.
(Law Member of the Council of the Governor General.)

1915—1920.



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TABLE OF CONTENTS.

Number of Minute.	Subject.	Page.
1	The legality of proceedings of a Magistrate holding his Court outside the local limits of his jurisdiction	1—3
2	Rejection of the proposal to amend the Sir Cowasji Jehangir Baronetcy Act, 1911	4
3	Rejection of the proposal to amend Section 464 (I) of the Code of Criminal Procedure	5
4 (I—II)	Operation of Martial law after the cessation of a state of War ..	6—7
5 (I—II)	Sir Ibrahim Rahimtoola's Charities Registration Bill ..	8
6 (I—II)	Amendment of the Indian Registration Act, 1908	9—10
7 (I—II)	Salary and fees of the Advocate General of Bengal	11—16
8 (I—II)	Confiscation of property belonging to deserting Soldiers under Forfeiture Act, 1857	17—18
9	Retention and use of enemy crafts captured in Mesopotamia without submitting them to condemnation by a Prize Court	19—22
10 (I—II)	Use of flags on ships owned by Native States when on high Seas	23—24
11 (I—II)	Extradition dealings between the Government of India and the Native States	25—26
12	Discharge from Dundrum Lunatic Asylum of the Criminal Lunatic, James Coghlan	27—29
13	Jurisdiction of the Judicial Commissioner's Court to try European British Subjects resident in Berar	30—31
14	Question whether a reference in an Indian Act to a repealed English Statute could be construed as a reference to a statute repealing and re-enacting the earlier statute	32—34
15	Liquidation of hostile firms in India during the continuance of the war.	35—37
16 (I—II)	Exclusion of "aliens" other than subjects of any State in India from sitting on Municipal Committees and District or Local Boards	38—39

Number of Minute.	Subject.	Page.
17	Power of the Governor General to exercise the prerogative of the Crown to pardon persons convicted by the Courts in India ..	40
18	Madras Town-planning Bill	41—44
19	Exemption of Bank deposits from income-tax	45—46
20	Distinction between a co-operative Society and a Company as defined by the Land Acquisition Act, 1894	47—48
21	Status of the Khan of Phuiera and the amendment of Section 86 of the Code of Civil Procedure, 1908	49
22	Interment of prisoners of War in British India	50
32(T—II)	Proposed repeal of Section 32 (2) of the Government of India Act, 1915. (Right of Indian Subject to sue Secretary of State. Decision in the Moment case)	51—55
24	The reception and detention in British lunatic asylums of lunatics from Native States	56
25	Exercise of jurisdiction over British Indian subjects committing offences in Bhutan	57
26	Proposed cancellation of the <i>Sauad</i> of Thakur Gopal Singh of Kharwa and forfeiture of his estate to Government ..	58—60
27	Interpretation of Section 105 of the Government of India Act, 1915, read with Section 32 (1) of the Interpretation Act of 1889. (Appointment of an acting Chief Justice or an acting Judge of High Court)	61—62
28	Personal Law in regard to marriage and mixed marriages ..	63—65
29	Insolvency law and procedure for Native States	66—67
30	Delays in Indian Privy Council Appeals and preparation of record in such appeals	68—74
31	Question of the liability to enhanced duty of duty-paid oil in a licensed tank at the time of the enhancement of the tariff rate	75—76
32	Interpretation of Section 98 of the Indian Lunacy Act, 1912 ..	77
33	Jurisdiction of the Courts outside British India to commit prisoners to British Indian Jails	78

Number of Minute.	Subject.	Page.
34.	Interpretation of, and power to wind up hostile firm ..	79—80
35	Decision to regard the Sikkimese Subjects as British Subjects for the purposes of the Treaties and Trade Regulations re- lating to Tibet	81
36	Construction of Section 180 (2) (d) of the Army Act ..	82
37	Cession of jurisdiction over portions of the North-Western Rail- way in the Bhala and Nabha States and over the Rajputana Malwa Railway in the Nabha State	83
38 (I—II)	Conveyance through British territory of prisoner arrested under French authority	84—85
39	Turkish "Notes" in Mesopotamia after British occupation ..	86
40	Appeals against acquittals	87—89
41	Kalambindi rights in the Baroda State and in the Rewa Kantha	90—91
42	Question whether the Pindara Jagirs in Central India are British or Gwalior territory	92—9
43	Necessity of previous sanction of the Governor General to the Madras Hindu Limited Owners Bill	96—99
44	Judgment of Mr. Justice Chaudhuri, Calcutta High Court, in the matter of arrest under Section 54 of the Criminal Proce- dure Code and the necessity of amending the Section ..	100-101
45	Acquisition of a new Surname by advertisement	102
46 (I—II)	Dealing with objectionable university Diplomas under Section 19 of the Sea Customs Act, 1878	103—104
47	Jurisdiction of British Courts over cargo of a foreign state tem- porarily landed in British territory	105
48	Persian Government's claim for a refund of the Bushire Customs and postal receipts collected during the British occupation of the port	106—107
49	Madras Children Bill	108—109
50	The Central India Excise Law, 1916	110
51	Extradition treaties with Native States and prosecution and conviction of extradited persons for separate offences ..	111—112

Number of Minute.	Subject.	Page.
52	Raising of the status of the Judicial Commissioner's Court in the Central Provinces	113—114
53 (I—II)	Question whether land revenue is rent or tax and the necessity of previous sanction of the Governor General to the Central Provinces Land Revenue Bill	115—118
54 (I—II)	Appeal against the conviction of Parshotam Rai Zala of the Junagadh State	119—131
55	Power of the Governor General in Council for revising sentences under Section 401 of the Code of Criminal Procedure and the exercise of the Royal prerogative by the Viceroy .. .	132—134
56 (I—VI)	Reconstruction of Ernsthausen's Indian business. [The Indian Companies (Foreign Interests) Act, 1918] .. .	135—139
57	Administration of Basra	139
58	Administration of Mesopotamia and Arabia	140—141
59	Examination of Section 79 (2) of the Government of India Act, 1915, as necessitating previous sanction of the Governor General to the introduction of certain local Bills	142—144
60	Consolidation of the Merchant Shipping Law	145—146
61 (I—II)	Proposed repeal of the Dekkhan Agriculturists' Relief Act, 1879	147—151
62 (I—II)	Application of Sections 128 and 130 of the Code of Criminal Procedure, 1898, to the Members of the Indian Defence Force	152—153
63	Interpretation of Sections 40 and 41 of the Land Acquisition Act, 1894. (Acquisition of land for a ship-building company) ..	154
64	Taking of oath by officials appointed from England, under the Government of India Act	155—156
65	Recognition by the British Government as a condition essential to the status of Chiefship in a Native State	157—159
66	Form of Order in the executive Council of the Governor General where a member dissents, and the signing of Despatch by a dissenting Member	160—162
67 (I—II)	Question of legislation to make Post Office Cash Certificates non-transferable	163—164
68 (I—II)	Barring of post-war claims in connection with the liquidation of hostile firms in India	165

Number of Minute.	Subject.	Page.
69	Effect of the judgment in the Mogul Steamship case bearing on the question of rebate agreements	166
70	Oral agreements in certain fishery leases in Madras	167
71(I—II)	Transfer of the convict Arjun Lal from Jaipur State to British custody	168—169
72	Disposal of the General Provident Fund money of the late Mr. W. H. Sharp. (Effect of subsequent will modifying former declaration nominating single beneficiary)	170—173
73	Question whether an entry in the sheet roll of any Indian soldier dying on active service can be treated as a valid will ..	174—175
74 (I—II)	Question whether Civilian enemy subjects interned in India are prisoners of war within Article 4 of the Hague Regulations	176—178
75	Proposed convention between the Government of Madras and the French Colony of Karikal regarding irrigation by the waters of the Kauvery	179
76	Assignment of Provident Fund money. (Case of Mr. A. J. Moon)	180—183
77	Granting of Solatium in the case of acquisition of land ..	184
78	Limit of territorial waters	185—186
79	Proposal to bring "Misjoinders" under the purview of Section 537 of the Code of Criminal Procedure, 1898	187
80 (I—III)	Proposed Ordinance to control the maximum price of certain articles of Commerce	188—189
81 (I—II)	Supply of warm clothing, etc., to lascars in sea-going vessels. Application or otherwise of English Merchant Shipping Law to vessels not registered in the United Kingdom ..	190—191
82	Rejection of the claim of Thakur Gopal Singh to succeed to the entire <i>Thikana</i> of Chowkri in the Jaipur state. Criticism by Sir Elliot Colvin of the attitude adopted by His Highness the Maharaja of Jaipur in the case	192—195
83	Interpretation of the term "finder" under the Indian Treasure Trove Act, 1878	196
84	Amendment of Article 179 of the Indian Limitation Act, 1908 and the period of limitation for substituting legal representatives of a deceased party in an appeal to the Privy Council and the printing of record in connection with such appeal ..	197—202

Number of Minute.	Subject.	Page.
85	The scope of Section 19 of the Criminal Appeal Act, 1907 and the desirability of amending the Code of Criminal Procedure, 1898, in terms of that section	203—204
86	Exemption from income-tax and super-tax of the allowance of the Nawab Bahadur of Murshidabad	205—207
87	A self-contained set of rules under the Arms Act for Berar ..	208
88	Certificate of naturalization under Act XXX of 1852 as conferring immunity from the provisions of the Foreigners Act, 1864. (Case of Mme Meli)	209
89	Question whether a Court-Martial can pass orders under section 517 of the Code of Criminal Procedure, 1898	210
90	Proposed amendment of the Indian Army Act, 1911 ..	211—212
91	"Re-enacting" of 'r nance within the meaning of Section 30 of the General Clauses Act, 1897	213
92 (I—II)	Interpretation of the Service qualification for appointment to the Governor-General's Executive Council. (Cases of Sir Sankaran Nair and Sir James Meston)	214
93	Reciprocal Service of summons between British India and Egypt	215
94 (I—V)	Proposed amendment of the Code of Criminal Procedure, 1898 (Tendering of evidence by accused on his own behalf) ..	216—219
95	Appointment of a whole-time Solicitor to the Government of India	220—226
96	Monuments maintained by Government under the Ancient Monuments Preservation Act, 1904	227
97	Construction of Section 86 of the Government of India Act as regards limitation of period of leave under the section ..	228
98	Liability of the principal for debts incurred by the agent ..	229
99	Railway receipts as instruments of title: their transferability ..	230
100	Effect of the repeal of the United Provinces Municipalities Act, 1900, upon the Chakrata Cantonment Law	231
101	Place of accrual of income for purposes of taxation under the Indian Income-tax Act	232

Number of Minute.	Subject.	Page.
102	Imposition of export duty on Indian raw products and restriction of imports from enemy countries	233—234
103	Draft Bill, to amend the British Nationality and Status of Aliens Act, 1914 (Points for consideration by the Indian representatives to the Imperial Conference)	235
104	Examination of the provisions of Sections 185, 526 and 527 of the Code of Criminal Procedure, 1898 as regards transfer of cases from one High Court to another. (Question of competing prosecutions in different High Courts)	236—237
105	Review of the proceedings of the Legislative Council of the Governor General for the year and the question of voting by Government officials	238—239
106	Construction of the expression " Lascar or other native Seamen " in section 115 of the Indian Merchant Shipping Act, 1859 ..	240
107	Construction of references to repealed statutes subsequently re-enacted by a new Statute	241
108	Power of legislation for Servants of the Crown in Native States. Question whether the power is exclusive or concurrent with the rights of the Native States	242—243
109	Panchayat Courts : question of limitation, jurisdiction and rule of evidence	244
110 (I—II)	Conferment of extra diocesan powers on the Bishops of Madras and Bombay	245—247
111	Civil Annuity Funds	248
112	Question of taxing Simla house allowance granted to the Government of India establishment	249—250
113	Question whether subjects of Native States are " Foreigners " within the meaning of the Foreigners Act, 1864 and of the Foreigners Ordinance, 1914	251
114	Question of jurisdiction of Local Government over the decision of the Financial Commissioner of Burma	252
115	Question whether desertion from the Portuguese Army is an offence as defined in the General Clauses Act, 1897 ..	253
116 (I—II)	Proposed amendment of the Workman's Breach of Contract Act, 1859	254—255

Number of Minute.	Subject.	Page.
117	Flying of British flag with a special device by vessels owned by rulers of Native States (Interpretation of Sections 69, 73 (I) and 734 of the Merchant Shipping Act, 1894) ..	256.
118	Amalgamation of the Judicial Committee and the House of Lords into one Imperial Court of Appeal	257—258
119	Question whether additional Sessions Judges with Civil Judicial functions come under Section 98 and Schedule III of the Government of India Act, 1915	259.
120	Question of amending the General Clauses Act, 1897 in regard to validating the Enemy Trading Order. (Validity of rules made under an Ordinance superseded by an Act) ..	260
121	Question of legality of the levy of license fees in the form of taxes in the Chakrata Cantonment	261
122	Question whether the provisions of Section 30 of the Government of India Act precludes leasing of a building for a Post-Office in a Native State	262
123	Right to tax British subject independently of his place of residence. (Consideration of the correspondence from the Assistant Minister in the Nizam's State)	263.
124	Disclaimers in Patent Law	264
125	Question whether a decree of the Egyptian Court is enforceable by execution proceedings in British India	265
126	Necessity of consulting before presentation of an appeal the law officer who would argue the same	266.
127	Section 56 of the Indian Contract Act, 1872 and the analogous provision in the English Law	267
128	Proposed draft of the Letters Patent creating a High Court in Lahore	268—270.
129	Retrospective effect of legislation. (Question of retrospective application of Section 6 of the Provident Fund Act, 1897) ..	271—272.
130	Prohibition of export of Ganja and Bhang under the Sea Customs Act, 1878. (Position of British Post-Offices in French territory in Madras under the Indian Post Office Act, 1898) ..	273.

Number of Minute.	Subject.	Page.
131	Application of "restriction order" and "Settlement order" in respect of gipsy tribes in the United Provinces ..	274
132	Interpretation of the expression "any law of India" in Section 177 of the Army Act	275
133	Power of Local Government to fill casual vacancies in High Court Judgeship (Question of appointing a temporary successor to Sir Ali Imam during the period of the latter's absence on leave)	276
134	Deed of cession from Keonthal State in respect of certain lands for Railway purposes: Question of securing similar cession from the Rana of Koti	277—278
135 (I—II)	Giving of evidence on his own behalf by an accused person ..	279
136	Power of local legislatures to affect the power of revision of Criminal cases by High Courts. (Proposed legislation by the United Provinces Legislative Council affecting the power of revision by the Allahabad High Court of Criminal cases decided by Panchayats)	280
137 (I—VIII)	Proposed draft of Schedule III of the Government of India Act, (Appointment of the Secretary and the Deputy Secretary in the Legislative Department from the Indian Civil Service or otherwise. Reservation of judicial posts for Members of the Bar. Sir George Lowndes' Minute of dissent to paragraph 13 of the Despatch)	281—285
138 (I—II)	Emergency war legislation and Martial law in the Punjab. (Question of passing validating and indemnifying Bill) ..	286—288
139	Amendment of the Indian Merchant Shipping Act, 1883. (Question whether Indian Marine Ships are ships "belonging to Her Majesty")	289
140	Trustee and trust property. (Question whether property vested in a trustee vests in him personally or <i>virtute officii</i>) ..	290
141	Power of the Maharaja of Travancore in respect of his legislative Council and High Court	291
142	Question whether R. I. M. officers are entitled to exemption under Section 6 (1) (s) of the Indian Income-tax Act, 1913 ..	292
143	Question whether the Acts merely declared by the Martial Law authorities to be offences come under the definition of "offence" under the Code of Criminal Procedure, 1898. (Interpretation of Section 402 of the Code)	293

Number of Minute.	Subject.	Page
144	Question whether a Local Government can confer additional power on a high court. [Examination of Section 79 (4) of the Government of India Act, 1915 in its bearing on Section 106 of the Act]	294
145 (I—II)	Amendment of Section 116 of the Indian Army Act with reference to the case of soldiers reported missing on active service	295—296
146	Question of creating an Indian Bar. Proposed restrictions on Indian Students seeking admission into Inns of Court ..	297—301
147 (I—II)	Liability of the Agent, Master and Shipping Master under the Merchant Shipping Acts of 1850 and 1883	301—303
148 (I—III)	Amendment of Chapter IX of the Code of Criminal Procedure 1893. (Proposed inclusion of the Indian Defence Force, Naval Forces and the Royal Air Force)	304—306
149	Appeal to the Privy Council. (High Court's power to refuse leave to appeal in cases where no substantial question of law is involved)	307
150 (I—III)	Privy Council Appeal of certain persons sentenced by Martial Law Commissions	308—313
151	Interpretation of Section 5 of Act III of 1858 and of Section 3 of Bengal Regulation III of 1818. (Issue of a fresh warrant at each transfer of a state prisoner under Regulation III) ..	314
152	Question whether a particular person is a "ruling chief" for purposes of the Code of Civil Procedure, 1908 ..	315
153	Precedence of Lord Willingdon as Governor on his transfer from Bombay to Madras. [Interpretation of Section 90 (1) of the Government of India Act, 1915]	316
154	Examination of Section 15 of the Criminal Tribes Act, 1911. (Suggested separate re-notification of the Moradabad and Meerut Sections of the Criminal tribes)	317
155	Question whether the office of a Member of the Governor General's Executive Council held by Sir James Meston became vacant on the latter's departure for England	318
156	Question of payment of six months' salary to the legal representatives of the late Bishop Lefroy, Metropolitan in India. (Interpretation of Section 119 of the Government of India Act, 1915)	319

Number of Minute.	Subject.	Page.
157(I—III)	Question of legality or otherwise of acquisition by Local Government of immoveable property under the Land Acquisition Act, 1894, for a private institution (Case of Isabella College)	320—322
158	Acquisition of an easement by Government under the Land Acquisition Act, 1894	323
159	Rules regarding destruction of records	324
160	Examination of certain clauses of the Bengal Town-planning Bill, 1919	325
161	Railway workshops. (Application of Section 83 of the Indian Railways Act, 1890 and of the provisions of the Indian Factories Act, 1911)	326
162	Transfer of negotiable instruments	327
163 (I—II)	Legislation by the Mysore Legislative Council. (Submission of a new law to the Resident before the Maharaja assents to it)	328—329
164	Naturalisation and denaturalisation of aliens.	330—331
165	Question of extension of the limit of territorial waters for purposes of legislation. Question whether Palk Straits and the Gulf of Manaar can be declared as <i>Maria Clausa</i>	332—333
166	Interpretation of Hindu Law as referred to in the <i>Sarada</i> . (Brandreth on Hindu Law of adoption)	334
167	Liability of Government for illegal acts committed under its orders (Question as to the action taken by Government in the Punjab under Martial Law and the Indemnity Act, 1919).	335—336
168	Acquisition by Government for Companies under the Land Acquisition Act, 1894	337—338
169	Examination of the Bombay Pleaders Bill with reference to Sections 106 and 107 of the Government of India Act	339—340
170	Jurisdiction of Courts in respect of Suit against a Prince or Chief	341
171	Creation of Indian "King's Counsels"	342—343
172	License of a clergyman taking up a new curacy or going to a new diocese. Seal of the letters of Ordination	344—345
173	Proclamation issued to the Governor General when he assumes his office. (Construction of the power of pardon granted to him under the Proclamation)	346

Number of Minute.	Subject.	Page.
174	Government of India Act. [Construction of Section 92 (4) as regards the amount of salary permissible to a conditional or temporary successor of a member of the executive council]	347
175	Effect of the Royal Amnesty Proclamation on the Securities deposited under the Press Act	348
176	Investment in Co-operative Societies of trust funds held by Government	349
177	Government of India Act, 1915 [Question whether the provisions of Section 105 (2) as regards appointment of acting judges of high courts are governed by Section 101 (4) of the Act]	350—351
178	Previous sanction of Governor General to legislation affecting Hindu Law Construction of Section 79 (3) of the Government of Ind. a Act	352
179	Interned Civilians and Prisoners of War. (Recoupment of maintenance charges of interned civilians)	353
180	Liability of an executor or administrator, as such, for super-tax	354
181	Steps to be taken to bring the Law and Regulation in India into conformity with the Hague Opium Convention of 1912.	355
182 (I—II)	Government of India Act. (Question of amending Section 33 to authorise the Viceroy to deal with certain classes of cases relating to Indian States independently of his Council) ..	356—357
183	Allocation of Berar revenues to the Central Provinces Government [Proposed amendment of Section 72-D of the Government of India Act with a view to provide for inclusion of Berar under Sub-Section 2 (b)]	358
184	Grant of compensation to Mr C G Todhunter, of Madras Executive Council under the proviso to Section 96-B (2) of the Government of India Act	359
185	Powers of the Government of India in respect of communications from Local Governments to the Secretary of State ..	360
186	Practising by retired High Court Judges in Courts over which they had jurisdiction or supervision	361
187	Provident Funds Act, 1897. [Proposal to increase the limit of deposit for the purposes of Section 3 (1) (a)]	362—363

Number of Minute.	Subject.	Page.
188	Disposal of the proceeds of the pre-Treaty liquidations ..	364
189	Trial of Matrimonial causes by young officers (Proposed withdrawal of local divorce jurisdiction from British Baluchistan and Quetta)	365—367
190	Jurisdiction of Criminal Courts in respect of rulers of Indian States. (Case of the Maharaja of Kolhapur) ..	368—369
191	Recognition by English Courts of divorce decrees passed by Indian Courts	370
192	Measures for public safety against failure of dams and reservoirs constructed by private agency or in Indian States for the development of water power. (Question of protection of British interests against dangerous structures in Indian States) ..	371
193	Significance of the institution of the Chamber of Princes ..	372
194	Power of a ruling chief to sue in British Indian Court ..	373
195	Exemption from Stamp duty of declarations under electoral Rule 11 (2) appointing election Agents	374
196	Transfer of appeals from the file of a Sessions Judge to that of an Additional Sessions Judge. (Proposed amendment of Sections 409 and 528 of the Code of Criminal Procedure, 1898)	375

CONFIDENTIAL.

NOTES AND MINUTES BY THE HON'BLE
SIR GEORGE LOWNDES, K.C.S I., K.C.

No. 1.

THE LEGALITY OF PROCEEDINGS OF A MAGISTRATE
HOLDING HIS COURT OUTSIDE THE LOCAL LIMITS
OF HIS JURISDICTION.

(24th December 1915)

I DOUBT if the real crux of the first and most important Home Department Proceedings question involved is whether Judicial A, January 1916, Nos 201-02 the opinion of the Advocate- (Legislative Department unofficial General of Bengal is right or No 807 of 1915). not *As far as it goes*, I agree with it, but I do not think that it touches the actual question at issue. I cannot read his opinion as directed to anything more than the question whether, having regard to the provisions of section 177¹ it is legal for a magistrate to hold his court *outs de the local limits of his jurisdiction* and I agree with him that such a proceeding would be of doubtful legality. The letter of the Bengal Government however takes this opinion as advising that it would be of doubtful legality for a sub-divisional magistrate to sit *outside the limits of his sub-division*, which is obviously quite a different question, and one which is certainly not dealt with in terms by the Advocate-General's opinion, and would appear from the absence of all reference to sections 12 and 13¹, not to have been considered by him at all. This latter question being the one that really concerns the Bengal Government, it seems to me that it is fairly open to us to suggest that it is not really answered by the opinion in question, and to consider for ourselves whether there is any legal objection to the course they proposed in the first instance to adopt. Personally I feel so clear that there is no legal objection to this course that I should be glad to treat the matter in this way if possible, and its having been consistently followed for many years in other provinces seems to make it particularly desirable to do so.

¹ The Code of Criminal Procedure, 1898,
(M) C. 42 L. D

Section 12 (2)¹ lays down in unmistakable language that all magistrates have jurisdiction throughout the district except in the single case of their jurisdiction having been limited by the definition of a local area, etc., under section 12 (1)¹. It follows logically that unless the putting of a magistrate in charge of a sub-division of the district is *in itself* the definition of a local area under section 12 (1)¹, his *jurisdiction* as distinct from his *charge*, *i.e.*, the sphere of his ordinary work, will still extend to the whole district and that any place within the district will be within the local limits of his jurisdiction. The issue therefore resolves itself into one question only, *viz.* is the nomination of a magistrate to the charge of a sub-division in itself a definition of a local area, etc., within the meaning of section 12 (1)¹ ? If this was the intention of the framers of the code one would have expected to find some sort of cross reference between the two sections to suggest that it was so. There is, however, nothing of the kind, and to my mind the language of section 13¹ does not admit of such an interpretation, as a main particular charge seems to me to be something quite different from his jurisdiction. But further than this the only authorities on the point² (the cases cited in Secretary's note) all support the view that a sub-divisional magistrate's jurisdiction is not necessarily confined to his sub-division. On the whole, therefore, I have no reasonable doubt that the appointment of a magistrate to a particular sub-division of a district is not in itself a definition of a local area to which his jurisdiction is confined but leaves him with jurisdiction throughout the district, and consequently that if he sits at *any place within the district*, even though outside his particular sub-division he is sitting within the local limits of his jurisdiction.

With regard to the alternative suggestion favoured by the Bengal Government, I concur with Secretary's doubts as to the legality of appointing two magistrates to the charge of a single sub-division. No doubt under the General Clauses Act 1897 the singular 'magistrate' in section 13¹ may include the plural 'magistrates' but the section seems to contemplate one appointment only at one time, and I agree that the wording would be inappropriate to the appointment of an additional magistrate to the concurrent charge of a sub-division.

With regard to the third alternative³ suggested by this department, I have only to say that in my opinion there is no legal

¹ The Code of Criminal Procedure, 1898

² I. L. R., 29 Cal. 389.

³ The suggestion was to increase the district cadres of first class magistrates with a view to their employment when necessary to relieve overworked sub-divisional Magistrates.

objection to the course suggested, and that though I cannot tell what administrative objections there may be to it, it appears to me that its adoption would give sufficient temporary relief to the congestion of the sub-divisions concerned.

With regard to the draft reply to the Bengal Government's letter I think that it will require considerable modification. I suggest that it would be sufficient on the first point to say that the Government of India while not differing from the terms of the Advocate-General's opinion, do not think that so long as a sub-divisional magistrate sits within the district to which his sub-division belongs he infringes the provisions of section 177 to which the Advocate-General has referred, and that they do not consider that there is within this limitation any legal objection to the course originally proposed by the Bengal Government which has been followed for a considerable time without objection in other provinces. With regard to the alternative proposal of the Bengal Government it should be stated that the Government of India are of opinion that there are legal difficulties which make this course inadvisable without legislation for which at present they think that there is no necessity. The third alternative suggested by this department might also be put to them as another practical way out of the difficulties which have arisen in congested sub-divisions.

No. 2.

REJECTION OF THE PROPOSAL TO AMEND THE SIR
COWASJEE JEHANGIR BARONETCY ACT, 1911 (XIX
OF 1911)*(28th December 1915)*

I CAN see no merits whatever in this Bill and I agree that the Government of Bombay should be informed that the amendments cannot be accepted. The proposal to constitute the holder of the baronetcy for the time being a member of the body of trustees is, I think, in itself unobjectionable, and if it had been inserted in the original Bill there would have been no reason to dissent from it. There seems, however, to be no particular reason why it should now be put forward, and I do not think that the Government of India should be asked to legislate on the point unless a strong case were made out. The other proposal embodied in clauses 3 and 4 of the draft Bill has already been negatived when the original Bill was under consideration, and there is no reason why it should be re-opened now. It has always been the policy both of the English and Indian law to disallow perpetuities of this kind as opposed to the interests of the public. The principle has only been relaxed in these baronetcy cases so far as to allow a perpetual settlement of such property as is considered requisite for maintaining the reasonable status of the holder for the time being, and this has already been secured in the present case by the original Act. In the case of Sir Currimbhoy Ebrahim the principle, was, no doubt, somewhat further relaxed, but there were very special circumstances in that case which have no application to the present proposals, and in my opinion it is not a precedent which should be followed in other cases.

No. 3.

REJECTION OF PROPOSAL TO AMEND SECTION 464 (1)
OF THE CODE OF CRIMINAL PROCEDURE.*(8th January 1916.)*

I agree that the proposed amendment is most undesirable.

Home Department Proceedings
Medical A, February 1916, Nos. 21-22.
(Legislative Department unofficial
No. 1 of 1916).

The only justification of it to my mind would be that under section 467 (2) a certificate is admissible. There seems, however, to be some difference in principle between acting on a certificate that a man is capable of making his defence, which is what section 467 (2) provides for and acting on a certificate that a man is of unsound mind, which is what is now proposed. The enquiry under section 464 is all important both to the Crown and the accused as on the one hand a guilty man by successful shamming may escape the consequences of a criminal act, and on the other an innocent man may be committed to a lunatic asylum. Every practitioner knows how fallible medical opinions as to mental unsoundness are, and in my opinion it would be most undesirable to allow a magistrate in a criminal proceeding to act upon a mere certificate without examining the medical officer to whom the test has been deputed. The amendment proposed would also conceivably lead to some laxity in the medical examination. I would also add that there is no evidence of general complaint as to waste of time in medical officers being required to attend the court on enquiries under section 464, and in practice such enquiries are probably not very frequent.

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No. 4.

(I—II.)

OPERATION OF MARTIAL LAW AFTER THE CESSATION
OF A STATE OF WAR.

I.

(13th January 1916)

IT IS, I think, clear that the action of the military authorities Foreign and Political Department can only be justified under Secret War, May 1916, Nos 515—517. martial law. It was not in any (Legislative Department Confidential No 460). sense a trial under military law except that the procedure adopted may have the procedure of military law, all acts of martial law are, *ex hypothesi*, outside the ordinary law of the land, and their only justification is the supreme necessity of the moment, that necessity being generally assumed to exist when, and only when a state of war or something equivalent to it, exists in the place where the acts are done. As soon as the necessity ceases all right to do such acts also ceases. Assuming therefore that at the time of the trial a state of war existed in Aden the sentence may have been justified by the necessity of the moment, but directly the state of war ceased (as I presume it did some time since) the power to deal with any one under martial law also ceased. ~ There can therefore, in my opinion, be no question now of enhancing the sentence passed by the military authorities.

It is also suggested that the conviction by the military authorities might be quashed and the offender tried again under the criminal law of the land, in which case a sentence of greater security might be passed. Whether or no there may be grounds for quashing the conviction it is impossible to say without further information, but I doubt whether it would be desirable in any event to throw doubt upon the legality of the conviction, and it is impossible to say at present whether, if the conviction were quashed, the necessary evidence would be available to obtain a conviction in the ordinary courts.

I should, however, be glad to see this file again when the record of the trial is received from Aden.

II.

(17th March 1916.)

Now that I have been able to peruse the record of this case, I am satisfied that nothing further can be done. It would I think

be very unwise for Government to take any steps to quash the conviction on the ground that the trial was irregular, or to take any step which would throw doubts on the legality of the action taken by the military authorities. Even if it were possible to try the man again in the regular courts I do not think that a conviction could be obtained, supposing the same evidence to be forthcoming, under Section 121 of the Penal Code which alone would justify a sentence of confiscation. I know of no inherent power in the state to confiscate.

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No. 5.

(I—II.)

SIR IBRAHIM RAHIMTOOLA'S CHARITIES REGISTRATION BILL.

I.

(2nd February 1916)

IN MY opinion the Bill in its present form falls within the purview of section 43 of the Act of 1861, now section 79 (3) (e) of the recent Act. I doubt if there is any distinction at all among Hindus and Muhammadans between "charitable" and "religious" purposes, and I should be inclined to think that any legislative restriction placed upon their rights in dealing with trusts of either character would affect their religion within the meaning of the sections referred to. In the present case the inclusion in the Bill, as now amended in Select Committee, of mixed trusts seems to me to be decisive.

II.

(10th February 1916)

I AGREE with Secretary's note. With regard to the draft reply to the Bombay Government, I suggest that the better way of putting it would be that there can be no right either statutory or constitutional to proceed with the consideration of a Bill which requires the previous sanction of the Governor General under section 79 (3) (e) of the Government of India Act, 1915, and to which that sanction has been (as it has been the present case) refused.

No. 6.

(I—II.)

AMENDMENT OF THE INDIAN REGISTRATION ACT,
1908 (XVI OF 1908).

I.

(3rd February 1916.)

No ONE suggests that the provisions of the Registration Act with which this Bill is concerned are obscure. It is only said that they are needless and that they are matters of procedure which ought not to be treated as essential. If the matter was one merely of procedure, as the Secretary of State seems to suggest, it would be covered by section 87 of the Act and there would be no case for any amendment of the law. That the provisions in question are essential is the whole basis of the recent decision in the Privy Council, and it is to be noticed (i) that these provisions were definitely adopted when the Registration Act was first enacted as part of the outwork of the defences against fraud, (ii) that they have never before been attacked during the long period of years that they have been in force, and (iii) that the injustice which it is now sought to remedy is caused in every case not by any essential hardship in the provisions of the law but merely by carelessness in their observance—a result to which the stupidity of sub-registrars has largely contributed. It would, in my opinion, be a mistake to relax the stringency of the registration law in any way; but I think that steps might well be taken to impress upon sub-registrars some of the elements of their every day duty and to penalise severely all cases of laxity.

In any case the form of the Bill is clearly objectionable. If anything is to be done it ought to be by direct amendments to sections 32 and 33 of the Act. I would, however, oppose the Bill generally.

II.

(16th February 1916.)

My Hon'ble Colleague, Sir C. Sankaran Nair, has asked me to reconsider this matter in the light of his note, and I have discussed the question with him at some length. I quite recognise that mistakes of sub-registrars in accepting documents for registration which they ought not to have accepted may cause hardship in the

case of ignorant persons, and I think that it may be possible to provide a remedy for such cases by allowing the documents to be re-registered within a certain period after the first discovery of the mistake. In order to put this suggestion into concrete form I have, at my Hon'ble Colleague's request, drafted tentatively a clause which, I think might be accepted for further consideration. I have discussed it with my Hon'ble Colleague, and I understand that he accepts it as satisfying the requirements of the case, and he thinks that the mover of the Bill will probably be willing to adopt it. If he does not, I think that his Bill should be opposed, and my present suggestion might be taken into consideration when the question of amending the Registration Act generally comes up. If however, Mr. Malaviya is prepared to allow his Bill to be cut down to a mere provision for re-registration in the cases referred to, and it is agreed that an amendment of the law on these lines is legitimate, I suggest that the Bill might be allowed to go to Select Committee on a statement in Council that though we were not in a position to support the Bill as drafted we were prepared to consider the advisability of some amendment of the law to meet cases of hardship. My re-registration proposal could then be discussed in Committee, and if adopted in its present or some modified form, would come back as the substantive Bill. Inasmuch, however, as the Bill in this form would in effect be a new Bill, it would probably be desirable to circulate it again before the Report was considered in Council.

Draft referred to in preceding note.

If in any case a document requiring registration has been improperly accepted for registration by a registrar or sub-registrar, and has been registered, any person claiming under such document may, within three months of his first becoming aware that the registration of such document is invalid, notwithstanding anything in this Act to the contrary, present such document (or cause the same to be presented, in accordance with the provisions of Part VI) for re-registration in the office of the registrar of the district in which the document was executed, and upon the registrar being satisfied that the previous acceptance of the document for registration was due to the mistake of the registrar or sub-registrar by whom the same was so previously accepted, he shall re-register the document as if it had not been previously registered, and as if such presentation for re-registration was a presentation for registration made within the time allowed therefor under part IV, and all the provisions of this Act as to registration of documents shall apply to such re-registration; and such document if duly re-registered in accordance with the provisions of this section shall be deemed to have been duly registered for all purposes.

No. 7.

(I—II.)

SALARY AND FEES OF THE ADVOCATE GENERAL OF
BENGAL.

I

(7th February 1916.)

THE PERUSAL of this file has been somewhat of a revelation to me. I had no idea before how costly legal assistance from Calcutta Home Department Proceedings was, and I can only hope that Judicial A., August 1916, Nos 360— the results obtained are proportionately better than those shown by the other provinces..

(Legislative Department unofficial No 255 of 1916.)

Assuming that the Advocate Generalship of Bengal is now to be provincialised, I should have thought *prima facie* that two main things were desirable, (1) that the Advocate General should be a salaried officer of the Government who would be expected for his salary to perform certain definite services without further remuneration, and (2) that the services so performed should be, generally speaking, uniform with those of the Advocate General in the other provinces.

Upon the basis of the present Bengal proposals, however it seems to me that neither of these principles would be applicable. The proposal is in reality to pay the Bengal Advocate General fees upon a fixed scale for every appearance in court with a guaranteed minimum of Rs 48,000 per annum, his opinion work only being reckoned at a *lump sum* per annum of Rs. 12,000 instead of being paid for piece-meal. This is undoubtedly a departure in principle from —

- (a) the recognised system of the past in Bengal,
- (b) the system adopted in the case of the other Advocate Generalships, and
- (c) the well-established practice governing payment to law officers of the Crown in England

To my mind this seems an almost insuperable objection to the method proposed, and, if there is still time to reconsider the basis of the arrangement, I would urge the great desirability of doing so.

My own view of the method which should be adopted is, first to fix the services of the Advocate General which should be covered by his salary. These I would define as—

- (i) all Government advising work whether by consultation or opinion, and

- (ii) appearances in all civil cases or proceedings originated in the Calcutta High Court or the Alipore Court, to which the Secretary of State is a party, and in appeals from all such cases.

I would then proceed to ascertain the salary which should be offered to the Advocate General for these services on the following basis. —

- (1) As a fair remuneration for advising work I would allow a *lump sum* per month. Quite possibly the Rs. 12,000 per annum suggested in the Bengal Government's letter under consideration would be not an unreasonable amount to take, though it is probably on the liberal side.
- (2) In order to estimate what a fair remuneration for the court work would be, I should propose to ascertain the number of briefs which on my proposed basis of services, but having regard to the altered constitution of the High Court, the Advocate General would have had to accept during the past five years, and the number of days on which he would have had to attend in court, and value them by the scale of fees drawn up by the Legal Remembrancer, allowing an average fee of five gold mohurs for consultations in each case. I would, however, only allow 30 gold Mohurs for appearances in the Alipore Court.

There should be little difficulty in making out the Advocate General's "fee list" on these lines for the last five years. The yearly average so ascertained, *plus* Rs. 12,000 for advice, would represent the market value of the Advocate General's services. Having regard, however, to the facts that the income offered would be an assured one, and that the professional position of the Advocate General is one greatly coveted at the Bar, and of itself attracts both other Government work and private practice to a considerable degree, I would offer a somewhat lower sum as the proposed salary. Possibly, it would be enough to cut off the odd figures, leaving a round sum in thousands only, but that would depend on how the actuals work out. I know nothing personally about the members of the Calcutta Bar at the present time, but I feel sure that any one who was worth having as Advocate General would accept a salary fixed on this basis; and if it is considered necessary to make the appointment before there is time to work out these figures the appointment might be made on the understanding that the salary would be so fixed.

If this plan were adopted, it should, I think, be made clear that the personal attention of the Advocate General was to be given to

all cases covered by his salary, though this would not necessarily mean that he could not avail himself within reasonable limits of a junior's assistance in any particular case

With regard to all other cases not specifically included above, in which Government was directly or indirectly interested, *e.g.*, cases where Government was paying either for the prosecution or defence of the action, Court of Wards, local body or mofussil cases and criminal appeals it would be part of the arrangement that the local Government should be entitled to the Advocate General's services at the scale of fees referred to above, omitting the 60 gold mohur-fee from the list, but providing that if he were asked to appear in any case outside the High Court or the Alipore Court he should be entitled to an additional fee of 30 gold mohurs for every day he was absent from Calcutta. The extra fee might also perhaps be allowed for criminal trials in the High Court.

If an agreement on these lines were made with the Advocate General for a definite period, the local Government would have a clear idea of how they stood financially in the matter of law costs, and they would have a discretion as to engaging the Advocate General in cases outside the agreement. It would also have the merit of making it clear in what cases the Advocate General could or could not claim fees, and would provide a basis which might be fairly applicable to the other Advocate Generalships.

I may explain that the reason why I would only take a limited class of cases as included in the salary is because these seem to me to constitute the regular Government work in Calcutta, while the cases I leave to be paid for by fees in the ordinary course are more or less exceptional both in their nature and their frequency or otherwise, and it may or may not be desirable in each case to engage the services of the Advocate General.

If my Hon'ble Colleague in the Home Department has had the patience to peruse this lengthy note so far, it will probably only have been with a mental reservation that all that I have said down to this point is rather beyond the questions which he desired to submit to me, these being rather as to the details of an altogether different arrangement which both he and the Bengal Government had already approved. If this is so, while I should regret that any appointment of an Advocate General should be made upon such a basis, I will endeavour to deal more specifically with the precise questions on which I have been consulted.

In the first place, I ought to point out that it is a mistake to talk of the Advocate General's salary in the past as a "retainer;" it is clearly a salary, and not a "retainer" as that term is used at the Bar. For this reason I would altogether disagree with the

suggestion made in paragraph 4 of the Bengal Government's letter that having regard to the "retainer" rules in force in Calcutta the Advocate General would not be bound to attend personally to any case, unless he were paid a special fee for so doing. This is within certain limits a correct statement of the rules as to "retainers" in their proper sense, but has no application whatever, in my opinion, to a salaried officer, and it would certainly be desirable to make this quite clear with regard to the new appointment. This is in fact one of the reasons why I have so strong an objection to the proposed payment by fees for all court work with a guaranteed minimum.

In the second place, I would point out that, as I read the Bengal Government's proposal (paragraph 7) they do not suggest the payment of Rs. 12,000 per annum for advising work in addition to the Rs. 48,000 per annum minimum, but only propose in making up the accounts of the year in order to see what sum will be payable to the Advocate General over and above that minimum to treat Rs. 12,000 of it as allocated to advising work, in effect paying him for court work any surplus over Rs. 36,000, (4,000—12,000) which the actuals would give him on the assumed scale of fees.

The proposal of the Bengal Government then, which my Hon'ble Colleague appears to favour, is that of agreeing to pay the new Advocate General Rs. 48,000 per annum *plus* any surplus which his actual court work would justify, over the Rs. 36,000 minimum. This, if the *principle* involved is finally accepted, appears to me to be fair, except that I would cut out the 60 gold mohur-fee for the Alipore Court, retaining it only for mofussil cases and perhaps for criminal trials in the High Court in which the Advocate General would not usually be employed. For the reasons given in paragraph 5 *ante*, I think that it is clearly reasonable to require the Advocate General to appear in regular Government cases in the Alipore Court for the usual High Court fee, though I understand that the Bar has agreed to treat this in practice as a mofussil court. I think it should also be borne in mind that with the separation of Bihar, a considerable part of the most remunerative work of the Calcutta Bar has been removed to another sphere, and I should hope that as time goes on there may be an appreciable difference in the incomes made by leaders of the profession in Calcutta, with a corresponding lowering of their scale of fees. If this does take place, on any new appointment in the future of an Advocate General, a revision would have to be made of the figures upon which the salary to be offered to him should be based, though the principle which I would lay down as that upon which it should be estimated would remain the same.

With regard to the patronage question, I agree with the Home Department, that, if the appointment is to be provincialised, it might well be left to the local Government.

In this connection the position of the Advocate General *vis-a-vis* the Government of India will also have to be considered. As a provincial officer he will naturally be a member of the local Council and could not at the same time serve on the Imperial Council. It should, however, be clearly understood that if he should in any case accept a nomination to the latter, resigning his membership of the local Council, he would be on exactly the same footing in the Imperial Council as any other nominated member and would be entitled to no extra remuneration whatever for his services.

My perusal of this file has also led me to the consideration of the kindred question of the remuneration of the Government Solicitors in their relation to the Government of India under present conditions. I see that the suggestion that it might pay the Government of India better to have a permanent whole-time Solicitor on their own staff has been considered and finally negatived; and though I have no desire to re-open a question which has been the subject of a considered decision, I think that the matter will quite possibly have to be reconsidered before long, as many questions of great importance and considerable complexity will undoubtedly arise after the war, which it will hardly be possible to deal with under the present arrangements. If any new arrangement is eventually made with regard to the Solicitor, the Advocate General's position as Legal Adviser of the Government of India will naturally also come up for further consideration, and I would reserve my consideration of this question until occasion arises. I understand that the present arrangement is to be that the Government of India reserves the right to consult the Advocate General as occasion arises upon payment of fees according to the appropriate items in the scale already referred to. Subject to the above remarks, this seems to me to be a fair and reasonable arrangement.

II

(20th April 1916)

I QUITE agree with Secretary that there is at present no "Advocate General" of Bengal, and that it is at least doubtful if the present acting Advocate General can legally exercise any of the powers conferred by Acts of the legislature on an Advocate General. I think, for instance, that it would probably be a valid

defence to a suit instituted in Calcutta under section 91 or 92 of the Civil Procedure Code with the consent of Sir S. P. Sinha that the suit was bad for want of the required legal sanction

Under the circumstances it is, I think, essential that a legal appointment should be made as soon as possible under section 114 of the Government of India Act, 1915.

An appointment under this section can clearly be made for any period and on any conditions, subject to His Majesty's pleasure, and there is no legal necessity that it should be for the now usual period of five years.

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No. 8.

(I—II.)

CONFISCATION OF PROPERTY BELONGING TO DESERT-
ING SOLDIER UNDER FORFEITURE ACT, 1857.

I.

(8th February 1916)

I FEEL that it is clearly desirable that the Army authorities (Legislative Department unofficial should have the power of No. 86 of 1916.) forfeiture in these cases but I share Secretary's doubts as to whether section 2 of the Act of 1857 would apply to courts martial held under the Indian Army Act, 1911, in Mesopotamia. There would, of course, be no difficulty in giving the required power by enacting a new section after section 29 of the latter Act following the lines of Section 2 of the 1857 Act, but this would of course entail the passing of an Act by the legislature and it is possible that it might be thought inadvisable to risk any discussion on the questions involved. The Act, however, would be a very short one and probably could be got through expeditiously as a war measure if necessary, though it might provoke some comment in the press. If, under the circumstances, this is considered undesirable, I am inclined to advise risking action by court-martial on the spot under the Forfeiture Act of 1857. I do not see how any forfeiture so made and enforced in British India could be well challenged. The deserter clearly could not do so without endangering his life in addition to his property, and it is of course only his own property that could be forfeited. It is possible that if his death could be proved his heirs might dispute the forfeiture, but this is hardly likely and under section 18 of the Supplementary Act, IX of 1859, if the property had been attached or seized by Government even if the adjudication were a nullity, the validity of the attachment or seizure could hardly be questioned in the courts.

II

(13th April 1916.)

I AGREE generally with Secretary's note. I think that the procedure to be adopted is correctly stated in his paragraphs 2 and 3; but in order to adjudge a forfeiture the court will of

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course have to find formally that the deserter has committed treason or an offence within section 121 of the Indian Penal Code.

With regard to the evidence to be produced before the court, I think I ought to state that in my opinion it will not be sufficient merely to tender statements of witnesses previously recorded under section 126 of the Indian Army Act, as I do not think that these statements would be admissible as proof of the facts deposed to under section 32 (2) of the Evidence Act. It will, I think, be clearly necessary to examine at least one witness who can depose to the facts relied upon as constituting the offence. The statements I have referred to would, in my opinion only be admissible under section 33 of the Evidence Act, if the court came to the conclusion that the deserter had had an opportunity of cross-examination. Having regard, however, to the fact that the inquiry referred to was of such a nature as could only be held in his absence, it is hardly likely that the court could come to this conclusion.

No. 9.

RETENTION AND USE OF ENEMY CRAFTS CAPTURED IN MESOPOTAMIA WITHOUT SUBMITTING THEM TO CONDEMNATION BY A PRIZE COURT.

(13th March, 1916.)

The real question with which we are concerned here is as to whether Imperial interests will be prejudiced at the end of the war by the retention and use by His Majesty's forces of various enemy craft which have been taken in Mesopotamia *jure belli* but without submitting them to condemnation by a prize court. The question is an important one and requires careful consideration

There is a considerable body of authority for the proposition that it is the duty of the captor to take every prize to the nearest port where it can be effectively adjudicated upon, unless for recognised reasons the prize is destroyed. But some of the text-books go further and suggest that the prize does not become the property of the captor until condemnation by a prize court. The writers on International Law, however, are by no means unanimous on this latter point. See Oppenheim's International Law, Volume II, page 239 Pitt-Cobbett's Leading Cases on International Law, Part II, pages 176 and 211: Hall's International Law 5th Edition page 456. Tiverton's Prize Law page 3 The fair result of the authorities, however, as I read them, is that though capture gives a possessory interest, it is only the decree of a Prize Court which can confer property or title—a distinction which is well recognized in other branches of the law, and see as to the case of a prize, Anderson v. Marten, L. R. 1908, A. C. 334 per Lord Loreburn at 338 and Lord Halsbury at 341.

But though it may be the custom of civilized nations to submit all prizes to the decree of a prize court it may well be that the neglect of this duty will not have the same effect in every case. The institution of prize courts was no doubt mainly for the protection of neutral interests (Oppenheim, page 239), and for the purpose of extinguishing neutral rights condemnation is no doubt essential under International Law, (see Article 48 of the Declaration of London). But where the prize was at the time of capture clearly enemy property and no neutral rights are involved, I doubt if the duty to bring it in for condemnation can be laid down in the same wide

terms or has the same binding force So in *The Leucade* (Spink's Rep. 221*) Dr. Lushington

*Cited by Hall, page 458 note The report is not available here. says that the bringing into adjudication at all on an

enemy's vessel is not called for by any respect to the right of the enemy proprietor where there is no neutral property on board. Where the prize is the property of the enemy *state* there can, I think, be no doubt that condemnation by a Prize Court is not required. It has, I believe, never been the practice to submit captured war vessels to such a court. With regard to private enemy vessels, the case is certainly not so clear, and there can be no doubt, I think that the *practice* is to do so. The necessity, however, of submitting such prizes to the decree of a Prize Court has never been laid down, so far as I know, by any of the treaties or conventions dealing with kindred subject, nor is it made obligatory by the Naval Prize Act, of 1864, which only provides that if a ship taken as prize is brought into port within the jurisdiction of a Prize Court the recognised proceedings shall follow. The pronouncement of Article 48, moreover of the Declaration of London above referred to, certainly suggests that no such rule is universally recognised except in the case of neutral ships.

But though in the case of private enemy ships it has apparently been the practice to bring them into a Prize Court for condemnation, there is no authority for the proposition that failure to do so affects the captor's right over them at all events so long as they remain in his own possession. Taking the simple case of the capture by a belligerent of a private enemy vessel which the captor retains and uses for his own purposes without any proceedings for its condemnation (which is in effect the case now under reference) it would seem on principle that the retention and use are absolutely within the captor's rights. There is no doubt that private enemy vessels are liable to capture, though various attempts to exclude them by convention have been made from time to time and if the capture is lawful, the right to retain and use seems to follow of necessity (certainly as much, one would think, as the right to destroy, which is clearly recognised), unless there is some positive rule of International Law which not only lays upon the captor the duty of submission to a Prize Court but also invalidates the capture if this duty is neglected. It may be that only the decree of a prize court can formerly vest the prize in the captor as against all the world which is the proper effect of a decree *in rem*, but its absence cannot, I think, of itself affect the rights of the captor as against an enemy owner. As against him the captor's possession acquired *jure belli* is good, though as against a third party, *e.g.*,

a neutral cargo-owner, possession without title could not prevail and title can only be acquired by the decree.

On the assumption therefore that the vessels in question were enemy property, the action of the military authorities in Mesopotamia can, I think, lead to no adverse consequences. It would no doubt have been better to get the vessels adjudicated upon by a Prize Court, and if their nature was such that they were incapable of being taken to the nearest port where such a court had jurisdiction, I think that under the circumstances the papers of the vessels and the depositions of those concerned might have been sent in and an adjudication could probably have been obtained upon them (Oppenheim, page 242). It seems clear that in exceptional cases the court can dispense with the necessity to bring the vessel itself into the jurisdiction of the court and that it will act on depositions taken in foreign territory. If, however, this is impracticable now, I cannot see that it will be any use to set up a Prize Court in Basrah even if such a course is feasible. Secretary in his note quotes Phillipson, page 366, as stating that a Prize Court can be set up in occupied territory; but the author gives no authority for this proposition and I do not know upon what he relies. The Prize Court Act of 1894, (57 and 58 Vict., c. 39) gives power to establish such courts in any British possession but that can hardly be considered as sufficient to include merely occupied territory. There is no doubt a precedent for the establishment of Prize Courts outside what is strictly British territory in the Act which constituted such courts for Egypt and Zanzibar (4 and 5 Geo. V, c. 79), but that again was only the conferment of prize jurisdiction upon existing British courts which is not quite the same thing as establishing a new court in occupied territory. However, this question is already before the Secretary of State and we shall no doubt have his views upon it shortly.

As the matter stands we have to face the position that it is probably too late now to get the vessels in question adjudicated upon in any way, and consider what the result will be. In my opinion even if it was the duty of the authorities in Mesopotamia, to have submitted the question of their captures to a Prize Court, they are nevertheless entitled to keep and use the vessels if they were enemy property and will be liable to no claim by the enemy owners for so doing.

This question seems to be fairly covered by the case of *The Felicity*, 2 Dodson's Adm.

Cited at length by Pitt Cobbett, R., 381. It is true that in this case Lord Stowell (then Sir W. Scott) appears to

page 117. Report not available.

have accepted the contention that even in the case of an admittedly enemy vessel the captor was bound by both municipal and international law to bring in his prize for adjudication, but he was clearly of opinion that failure to do this could cause no loss to the enemy owner, and therefore (presumably) would raise no claim for compensation.

No. 10.

(I—II.)

USE OF FLAGS ON SHIPS OWNED BY NATIVE STATES
WHEN ON HIGH SEAS.

I.

(22nd March, 1916.)

WE HAVE under the existing law no power to compel the use by Native States of a particular flag upon the high seas. We can only in a proper case press upon them its use as a necessary condition of our protection.

Foreign and Political Department,
Secret I, Proceedings February 1917,
Nos. 21—25.
(Legislative Department unofficial
No. 172 of 1916).

I have little doubt that the use in a ship, owned by a Native State, or by a subject of such State, of the British flag with the intention of causing it to be believed that the ship was a British ship, or even under British protection, would subject the ship to forfeiture under section 69 of the Merchant Shipping Act of 1894. Whether the use of the flag would of itself without other evidence of intention be sufficient to bring such a ship within the penalty may perhaps be doubtful, but, inasmuch as the flag is generally accepted as the badge of nationality, it would, in my opinion, be sufficient to entitle any of the authorities mentioned in section 76 to seize the ship if found on the high seas and to bring her in for adjudication. I do not think that the mere fact that the ship was licensed, or even required by the Government of India, to fly the flag would be sufficient to exempt her from seizure under such circumstances. Nor do I think that a right to use the flag outside the limits of British India could effectively be conferred by an Act of the Indian legislature. The Secretary of State, in his despatch of the 29th October 1915, appears to take the opposite view, but the language used is obscure. No doubt the permission referred to could be effectively granted by Parliament by a modification of section 69 or any other substantive enactment; and equally no doubt the penalty provided for by the section could be waived by the Crown. But as long as the provisions of the section stand, it would hardly be reasonable to bring political pressure to bear upon Native maritime States to induce them to adopt a practice, which might fairly subject their ships to the inconvenience of being brought in for adjudication even though they might eventually be released. Unless, therefore, the case of Native States in India is legally exempted from the operation of section 69 of the Merchant Shipping Act, 1894, I do not see how the policy which the Secretary of State advocates can be put into effect.

II.

(30th November, 1916.)

The use of the British flag is not expressly prohibited, nor of itself penalised, by section 69 of the Merchant Shipping Act, 1894 ; it is only the use of the flag with intent to deceive that comes within the mischief of the section. The Secretary of State suggests that we should *require* Native State vessels to use our flag on the high seas, and all I meant by my previous note was that it would hardly be reasonable to do this, if the adoption of the practice would subject such vessels to inconvenience. If, however, His Majesty's ships do not in practice take action against Native State vessels under such circumstances, and this could be ensured by executive orders, I see no legal objection to pressure being brought upon the Native States to follow the practice which the Secretary of State suggests. If the conditions agreed to at the Brussels Conference were strictly followed, and the vessels in question carried a formal license to use the flag, there would, I think, be no chance of any of His Majesty's ships interfering with them merely because of the flag they flew.

I would also venture to suggest that if the matter is to be laid before the next Chiefs' Conference it might be possible to suggest to them, with the consent of the Secretary of State, the use of the usual red ensign with a special charge upon the " fly " or red field which might be the proper device of each Native State. This might perhaps appeal to the Chiefs and would be a sufficient safeguard against the provisions of the section. The right to use such a device could, I believe, be formally granted by Royal Warrant. It is commonly used on the flag displayed by colonial merchantmen and even by some yacht clubs at home.

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No. 11.

(I—II.)

EXTRADITION DEALINGS BETWEEN THE GOVERNMENT OF INDIA AND THE NATIVE STATES.

I.

(11th April, 1916)

Foreign and Political Department
Internal A, July 1916, Nos 34—36.
(Legislative Department unofficial
No. 161 of 1916).

I HAVE little to add to
the very valuable notes that
have already been recorded
in this department.

There is no doubt that the British Government have adopted as an axiom of all their extradition dealings with Foreign States, the principle that an alleged criminal shall not after extradition be tried for any offence committed prior to his surrender other than the crime proved by the facts on which the surrender is granted. That this is so is shown conclusively by section 3 (2) of the Act of 1870.

It is also clear that in respect of the extradition dealings between the Government of India and the Native States no such absolute restriction on the surrender of fugitive criminals has been adopted, and it may well be that the reason for this is (as pointed out by Secretary) that in the case of Native States we have such a large measure of control over their actions that there was no necessity to embody the restriction referred to in that portion of the Indian Act of 1903 which dealt with Native States extradition.

The fact, however, that it was not thought necessary to provide for this restriction formally in our Act does not in any way affect the importance of the principle referred in paragraph 2 above, which appears to me to be based upon elementary principles of justice. I have no doubt that so long as we profess to have relations of the nature of extradition treaties with Native States, it is a principle which ought to be followed, and if the Native States with whom we have either treaties or formal agreements are willing to accept it (as I understand they are generally), I think that the principle should certainly be adopted and definite orders on the subject issued.

I am not much affected by the supposed conflict between the views of two of my learned predecessors on this subject, though

having regard to the passage marked (first paragraph) in Sir A. E. Miller's note* of 26th August 1893, it seems clear

*Internal A., September 1893, Nos. 257—261. (Notes page 4).

†Internal A., July 1890, Nos. 233—235.

that there was no real conflict between them. If, however, I have to choose between two conflicting views, I have no hesitation in adopting that of Sir A. R. Scoble† that "it is necessary to secure that the person surrendered shall not be put on his trial and punished for some other offence than that for which he has been extradited and in regard to which no evidence has been tendered."

For these reasons I would agree with the recommendation of the Bombay Government.

II.

(8th June, 1916)

With reference to Mr. Wheeler's¹ note of 2nd June, 1916 I have suggested certain slight alterations in the draft.

With reference to the latter part of my Honourable Colleague Sir R. Craddock's² note, I have really nothing to add to what I wrote on 14th April, 1916. One view of the position might well be that the State which surrendered an alleged criminal has no further concern with his fate. The other (and the one which has certainly been adopted by the English Law) is that we recognise the right to protection of every one who harbours in our territories, and that we will only give him up to another State to be tried provided they satisfy us that there is a *prima facie* case against him. If this is the principle which we should adopt in India, as I think it is, then it is a clear infringement of the principle to allow a man to be tried for any other offence, whether extraditable or otherwise, as to which we have not satisfied ourselves that there is a *prima facie* case.

¹Secretary in the Home Department.

²Home Member.

No. 12.

DISCHARGE FROM DUNDRUM LUNATIC ASYLUM OF THE
CRIMINAL LUNATIC, JAMES COGHLAN.*(28th April, 1916)*

I THINK the question raised by these papers requires further examination. The particular case may not be of great importance to us, as Coghlan is not likely to trouble us again in India. But a case might well occur where the release of a criminal convicted out here might have serious consequences to us, and it must be remembered that there is always a certain political aspect to such matters in the suggestion that we keep a sort of back-door open by which British criminals are enabled to escape the consequences of a conviction in India.

It is of course within our discretion out here whether or not to send a prisoner or criminal lunatic home under the Colonial Prisoners Removal Act, 1884; and if the Home authorities have the power arbitrarily to order his discharge without consulting us, we should have to be cautious in exercising our discretion. I think, therefore, that it is important for us to know definitely whether such power exists and in what cases, and that we should ask the Secretary of State in the first place to let us know precisely under what circumstances the power referred to is exercisable. The present case is, in my opinion, one in which we may fairly ask for the advice of legal authorities at home as the question is not in any sense one of Indian law. When we know where we stand, it may be desirable to press for some alteration of the law or for the issue of executive orders applicable to such cases.

The legal position, as far as I can elucidate it, appears to be as follows. Under section 10 (1) of the English Act referred to, subject to any regulations made by His Majesty's Government under the Act in relation to criminal lunatics, all laws and regulations in force in the place where the lunatic is confined for the time being apply to him as if he had become a lunatic in that place. Coghlan at the time of his release was confined in Ireland, and it is therefore necessary to see what powers over him the Irish authorities would have had under Irish law "If he had become a criminal lunatic" in Ireland. This, however, is not easy to elucidate out here. Under 1 and 2 Vict., c. 27, section 2, "the Lord Lieutenant or other chief Governor or Governors (an expression which apparently also includes the Lords Justices, see 5 and 6 Vict., c. 123, section 52) may order

any person under sentence of imprisonment to be removed to an asylum, and such person shall remain in confinement there until certified to the Lord Lieutenant, etc., by two physicians that he has become of sound mind, whereupon the Lord Lieutenant, etc., may, if such person remains subject to be continued in custody, direct him to be remitted to prison or if his sentence has expired direct him to be discharged." Under 5 and 6 Vict. c. 123, Asylum Inspectors have certain powers as to the discharge of lunatics, but under section 31 their power does not apply in the case of lunatics confined under any order of the Lord Lieutenant or of any criminal Court, though in such cases they can (as they apparently did in the present case) report upon his condition to the Lord Lieutenant. 8 and 9 Vict., c. 107, is also much to the same, see in particular section 12.

Assuming the case, therefore, to be substantially governed by 1 and 2 Vict. c. 27, section 2, the only power of the Irish authorities in the case of a man who had become a lunatic after his conviction and sentence but had recovered before the period of such sentence had expired was to remit him to prison to serve out the rest of his sentence. It may perhaps have been considered that in such a case where the criminal had been sentenced in India, the Irish authorities would have no power to send him back to India though it would appear that such power is directly conferred on them by section 3 read with section 10 (1) of the Act of 1884. This, however, is one of the points on which it is important for us to be advised by the Home authorities.

There can be no doubt that Coghlan was legally in the position of a convict who became insane after conviction. The plea of insanity was raised at his trial but negatived by the jury. His sentence was subsequently commuted to penal servitude for life, no doubt on the ground that though not insane he was weak-minded, and therefore that the alternative sentence of penal servitude allowed by our law for murder was more appropriate.

I cannot help thinking, however, that the Irish authorities not being familiar with our criminal law, treated the case as one where the conviction was equivalent to the special verdict now returnable in England of "guilty but insane," and the sentence as equivalent to the usual order for detention till the King's pleasure is known. No doubt if this was the real position, the Lords Justices might have power to order his release on his sanity being sufficiently established, and if this is the extent of their real power, we should have nothing to complain of.

I am led to infer that a mistake may have been made in this way by the telegram from the Secretary of State at the instance of the Medical B., November 1911, Irish Government, dated the 27th October, 1911, and the Nos 5-9.

statement in paragraph 2 of their letter of the 13th December, 1915, It is also noticeable that the authorities in India over and over again referred to the fact of the sentence having been commuted owing to Coghlan's insanity, which may have contributed to the

Medical A., October 1911, Nos. 35— view above referred to, though 41. the actual order of removal signed by the Secretary of State would seem to be clear enough.

Of course, if a mistake has been made, and the general principle is, as I have suggested in paragraph 3, we need not carry the matter any further. But if there is power in the Home authorities to release a man who has become insane after conviction in India but has recovered his sanity before the expiration of his sentence, we ought to take the matter further with the Secretary of State.

For these reasons, I think paragraph 2 of the draft despatch requires some modification. The facts, as stated in the first three sentences, might stand, but I would emphasise the general importance to us of the release of Indian convicts, under the Colonial Prisoners' Removal Act, 1884, before the expiration of the full term of their sentences, and ask to be advised, with reference to section 10 (*I*) of the Act, what are the powers in this respect under the laws of the United Kingdom, and under what circumstances they are exercisable. It might be explained that this information is necessary for our future guidance in order that we may be in a position to know how we stand with regard to criminal lunatics whom we may desire to send home under the powers conferred by the Act. I agree with Secretary that it is not desirable that the despatch should appear in any way to question the correctness of the decision arrived at in the particular case.

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No. 13.

JURISDICTION OF THE JUDICIAL COMMISSIONER'S COURT TO TRY EUROPEAN BRITISH SUBJECTS RESIDENT IN BERAR.

(15th May, 1916.)

THE position is, I think, correctly stated in the above note. The Foreign and Political Department basis of the suggestion, made by Secretary, is that the restriction upon our ordinary legislative powers, contained in section 65 (3) of the Government of India Act, 1915, does not apply to our powers under the Foreign Jurisdiction Order in Council of 1902, so that under the latter we can empower the Judicial Commissioner's Court to try European British subjects resident in Berar on a capital charge, though that Court, under its existing Act, cannot try European British subjects residents within its jurisdiction on a similar charge. I think that legally we can do this, but the anomaly is very great, and I do not think, we ought to continue it if there is any less anomalous course open to us*. In the first place, if the Judicial Commissioner's Court is a suitable court to try non-Christian

(Legislative Department unofficial No 173 of 1916)

*Questions as to Berar are always complicated and always will be until an Act of Parliament is passed to deal with it, but I think we ought to try and simplify and rationalize every Berar question as far as possible, as occasion arises.

European British subjects resident in Berar, why is it not fit also to try Christian European British subjects resident there, and why not therefore let it try all European British subjects in Berar? In the next place, if the Judicial Commissioner's Court is fit to try any European British subjects in Berar, why is it not equally competent to try European British subjects (and persons to be tried jointly with them) who are residents within its own local limits?

It is not probably a case of "fitness", it is only, I imagine, that the Central Provinces Courts Act, 1904, was (for some reason which I do not understand at present) passed without the previous approval of the Secretary of State under section 65 (3) of the Government of India Act, 1915 (or the then corresponding provision). It seems to me, therefore, that the obvious solution of the difficulty is to repeal section 3 of the Central Provinces Courts Act, 1904, and to pass a short Act, with the previous approval of the Secretary of State, empowering the Judicial Commissioner's Court to sentence European British subjects to death, and to let it try all European British subjects of the Central Provinces and of Berar.

I cannot conceive that if the present anomaly were pointed out to the Secretary of State, he would refuse his approval to the Bill. Of course, if the Judicial Commissioner's Court is not fit to be trusted with these powers a difficulty would arise, but, as already stated, I do not suppose that this is the case. If it is so, it seems obvious that the sooner the Judicial Commissioner's Court is improved the better for the Province generally.

The course I have suggested would also get rid of the difficulty with regard to persons tried jointly with Europeans resident in the Central Provinces, whose case does not seem to be provided for directly by the existing not fications and would solve the other question raised by the Central Provinces Government's letter.

On talking this case over with Secretary, he suggested that it might perhaps be difficult to differentiate in such a matter between the Central Provinces Courts and other Judicial Commissioners' Courts and that if the power to try Europeans for a capital offence were given to the Central Provinces Courts, it would be hard to deny it to other courts of a like status. Personally I should not be afraid of this, as our policy nowadays is to put Europeans and Indians as much on the same footing as possible, and I cannot see why a court which can be entrusted with powers of life and death over Indians, should not be entrusted with the same powers over Europeans. But if it is felt that there is a serious objection to the course I have suggested, the obvious way out of the difficulty would be to turn the Central Provinces Court into a Chief Court, which, in the case of so large and important a province as it was even before Berar was attached to it, would be only a just and natural concession.

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No. 14.

QUESTION WHETHER A REFERENCE IN AN INDIAN ACT TO A REPEALED ENGLISH STATUTE COULD BE CONSTRUED AS A REFERENCE TO A STATUTE REPEALING AND RE-ENACTING THE EARLIER STATUTE.

(17th May, 1916)

I HAVE to thank Secretary for the interest he has taken in the elucidation of this question and for his very interesting note on the subject, but I am not at all sure that the difficulty has been solved.

Home Department Judicial A, June 1916, Nos. 142—144
(Legislative Department unofficial No. 280 of 1916.)

The point under discussion arose with reference to the construction of section 122 of the Civil Procedure Code which gives certain powers to "High Courts established under the High Courts Act, 1861," and the specific question under consideration was whether these words could legitimately been construed as including the new Patna High Court which is established under the Government of India Act, 1915, this Act repealing and re-enacting with modifications the material provisions of the Act of 1861.

The case is, as Secretary points out clearly, not within the words of section 8 of the General Clauses Act, 1897, and there would seem to be no other statutory rule of construction which would apply.

The ordinary rule of construction applicable to statutes is that the actual words used must be construed in their general grammatical sense, and that if the connotation of the enacting words is in itself precise and unambiguous, the court cannot go beyond or outside them. It is sufficient to refer in this connection to Lord Macnaughten's judgment in *Vacher's case*, 1913, App. Cases, 117-118. Lord Esher's dictum in *Sharpe v. Wakefield*, 22 Q. B. D. 239 to 242 that "the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted, or has altered the previous statute," is also worth consideration though it must be taken subject to the well-established rule that where a statute deals with a genus it may be extended to a new species within that genus which

did not exist or was not known when the statute was passed See per Bovill C. J. in *Q v. Smith*, L.R. 1, C C R. at page 270 and *A G v Edison Coy*, 6 Q B D 244.

I doubt if any court following these rules of construction could construe the words in section 122 of the Civil Procedure Code, namely, "High Courts established under the High Courts Act of 1861" as including a High Court established under the Government of India Act, 1915. Of course if the Act of 1861 stood alone, such a construction would be almost manifestly impossible, as the Patna High Court could not have been established under that Act, having regard to the provisions of section 10. But it could have been established under the Act of 1861 as amended by the Act of 1911, and if the Government of India Act of 1915 had not been passed until after the Letters Patent of the new High Court had been issued, I think that there would have been no difficulty as to the application to it of section 122 of the Code

It is possible that where a particular provision of an Act has been merely removed from an earlier Act to a later one and re-enacted in it *totidem verbis*, the court might, on the analogy of the maxim *falsa descriptio non nocet*, construe a reference to the earlier Act as covering the later one, though I know of no actual authority for such a proposition, and the case of *R v. Swan*, 4 Cox's Cr. Cases, 108, which Secretary has kindly given me, certainly seems to be against such a view.

Nor do I think that the *analogy* of section 8 of the General Clauses Act help us. It is one thing for the Indian Legislature to say that where they repeal and re-enact with modifications, references in their own Acts to the original enactment shall be taken as referring to and embracing the later modifications, but quite another thing (as it seems to me) to assume that they also meant that where another Legislature altogether may have repealed and re-enacted with such modifications as it thinks desirable, they shall always be taken to have adopted these two. I cannot think that the one proposition follows by any means necessarily from the other.

The doubt which I have ventured to express does not of course merely affect section 122 of the Civil Procedure Code, but is of very wide application. It touches every reference in any one of our Acts to an English statute, and if there is any substance in it may land us some day in difficulty. The passing of the new Government of India Act brings the question into some prominence and the only way out that I can see would be to amend the

General Clauses Act*, but this would need careful consideration.

I suggest as a preliminary that we might put the concrete question under section 122 of the Civil Procedure Code to the Patna High Court and see what they say about it. It would at all events help the consideration of the general question. If we did this I might write demi-officially to the Chief Justice with regard to it.

*Section 8 of the Act was subsequently amended by Act 18 of 1919 by the addition of the following sub-section — '(2) Where any Act of Parliament repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any act of the Governor-General in Council or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.'

No. 15.

LIQUIDATION OF HOSTILE FIRMS IN INDIA DURING
THE CONTINUANCE OF THE WAR.*(17th May, 1916.)*

THE POLICIES adopted in England and in India on this subject have been so divergent in the past that it will be a matter of some difficulty to bring them into line, particularly having regard to the terminology adopted.

Department of Commerce and Industries, Commerce and Trade A., Proceedings July 1916, Nos. 59—96. (Legislative Department Confidential No. 465.)

The Home policy as embodied in the Trading with the Enemy (Amendment) Act, 1916, seems to approximate in some way to that adopted in India from a very early period of the war. Until this Act was passed there was nothing in the Home Legislation to prohibit *e.g.*, a German, or German firm, from carrying on business in England, the only enemies with whom trading was prohibited being defined by the proclamation of the 9th September 1914 as "any person or body of persons of whatever nationality resident in or carrying on business in an enemy country." The 1916 Act, however, is aimed at the suppression of every business carried on in the United Kingdom wholly or mainly for the benefit of or under the control of "enemy subjects" which are defined as meaning "subjects of a state for the time being at war with His Majesty." This makes the term "enemy subject" in the English Act equivalent to hostile foreigners, in our Hostile Foreigners (Trading) Order of 14th November 1914. We should, however, in India for the sake of uniformity still adhere to "hostile" as against "enemy" if possible.

In the case of every such business, the Board of Trade is now bound subject to an exception which I will refer to more specifically later, either (a) to prohibit the carrying on of the business except in effect under a license, or (b) require it to be wound up. (a) Is already provided for in India in the case of "hostile foreigners" and "hostile firms" by the Order of 14th November 1914.

If we want to bring our policy into line with that now adopted at home, we shall with regard to (a) have to enlarge our powers under the order of 14th November 1914 so as to cover in addition to "hostile foreigners" and "hostile firms") persons, firms and companies in whom there is no personal "hostile".

element but whose business is carried on mainly for the benefit of or under the control of the "hostile" foreigners or firms. Such a case was illustrated in the debate on the English Act in the House of Commons by a reference to a purely English company whose whole or main business was the sale in England of German pianos. Such a company would be hit by the English Act, but an Indian company doing the same business out here would not come within the purview of the Order of 14th November 1914. This I think, is what the Secretary of State refers to in paragraph 5 of his despatch of the 14th April 1916. Commerce and Industry Department probably know whether there are as a matter of fact any Indian firms doing this kind of business. It seems not unlikely that some firms of naturalised Germans whom we should not be sorry to rope in, may come within the scope of such a provision.

The English Act clearly reserves to the Board of Trade a discretion whether to prohibit trading except under a license, or to wind up, and think that we should reserve the same discretion which would leave us free in the case of a business which was carried on both here and in England only to wind up here if they did the same in England.

The exception I referred to in paragraph 2 above allows the Board of Trade to leave alone altogether any business, though carried on for the benefit of "enemy subjects," where for some "special reason" it was considered inexpedient either to prohibit or to wind up; but in the debate on the Bill in the House of Lords, Lord Curzon (though I am not sure that he really appreciated the point) stated specifically that the exception was intended only to apply to (i) businesses which it is for the national interest to leave unfettered, and (ii) petty businesses which are not worth winding up. Probably we should retain the same discretion, subject to which the Act should be obligatory.

I agree with Secretary that the most convenient machinery to adopt for the purpose of winding up will be that of the Companies Act with suitable modifications. This will be in accordance with the policy of section 1(2) of the English Act.

It will also be for consideration whether any of the other provisions of the English Act should also be embodied in the Ordinance. We should, I think, certainly adopt the powers conferred on the Board of Trade by section 4 of the Act so as to enable us instead of winding up to eliminate in cases where it may be thought desirable the "hostile" element from a mixed firm or company leaving it free to carry on legitimate business. This however, would be applicable both to cases where the hostile element

is predominant and where it was of small extent, see per Solicitor-General in Committee on 25th January 1915, page 2941 of the report. If we retain the drastic provisions of clause 2 (b) of the order of the 14th November 1914, I think that we should have to allow a company which has bought out its "hostile" element to trade freely, or at all events under supervision. See as to the English policy, per the Solicitor-General on this section (then section 3 of the Bill) on 21st January 1915, page 2592 of the Report.

If we adopt the provisions of section 4 of the English Act, we should probably have to take sections 5, 8 and 9 also. Commerce and Industry Department will no doubt tell us if they attach importance to any of the other sections of the English Act.

I have only to add a word as to the practical difficulties which will probably arise in carrying out the proposed policy. It is, I understand, of the essence of this policy that the liquidation should be completed before the end of the war, so that it may be as difficult as possible for Germans to start trade again in India. If this is the main object in view, I think that we ought to have a very clear idea beforehand of how it is to be done. It may be that there is not much time before us, or at all events that we cannot safely count on sufficient time for disposing satisfactorily of all the concerns involved. Are we then going to realise at whatever cost within a certain time, or are we going to be left with the Agags of our spoil which we cannot bring ourselves to sacrifice? I venture to think that we ought to face this question at once and come to definite conclusion upon it. Forced realisations never bring satisfactory prices and if we are to realise at all costs before the end of the war, we shall have to make up our minds to get very little by many of the liquidations, and nothing will be gained by putting sales off to the last possible moment.

No. 16.

(I—II.)

EXCLUSION OF "ALIENS" OTHER THAN SUBJECTS OF ANY STATE IN INDIA FROM SITTING ON MUNICIPAL COMMITTEES AND DISTRICT OR LOCAL BOARDS.

I.

(18th May, 1916.)

I AGREE that it is desirable to exclude aliens from every form of Education Department Proceedings Indian franchise and representation I also agree that it Municipalities A., June 1916, No. 10. (Legislative Department unofficial No 234 of 1916.) would be undesirable to class subjects of Native States as aliens for this purpose. But if provisions to this effect are to be embodied in various local Acts and rules it is important that the same formula should be adopted in every case. The General Clauses Act, 1897, section 3 (27) speaks of 'Native Prince or Chief under the suzerainty of Her Majesty exercised through the Governor General of India', etc. This was taken from the English Interpretation Act [52 and 53 Vict. C. 63, section 18 (5)] and was the expression adopted with reference to the Gaekwar by the Secretary of State's certificate in *Statham versus Statham* 1911, Prob at page 95. On the other hand the Civil Procedure Code 1908, section 85 (1) refers to "Ruling Chief. in subordinate alliance with the British Government." Older definitions are to be found in the Christian Marriage Act XV of 1872, section 3, and in the Native Coinage Act IX of 1876, section 2. I think that it will be for the Foreign and Political Department to consider what formula is most suitable at the present time. It may be that there will be something in the new Government of India Amendment Act bearing on the question. The expression used in the Civil Procedure Code has at all events the merit of not using the word "native."

II.

(7th June, 1916.)

If the Political Department are satisfied with the expression "Subjects of any State in India" I have nothing further to say about it, except that all the Governments concerned should be asked to use this formula.

The term "aliens" no doubt technically includes subjects of native States in India and local Governments should be asked to avoid its use in this connection.

We are not considering whether or not it is desirable that subjects of Native States should be admitted in all cases to the municipal franchise, and this question is one for each local Government to consider for itself. All we are asking them to do is to disqualify all persons who are not either British subjects or subjects of Native States. I think therefore that it would be wise to embody in the letter the suggestion contained in the last sentence of Secretary's note.

No. 17.

POWER OF THE GOVERNOR GENERAL TO EXERCISE
THE PREROGATIVE OF THE CROWN TO PARDON
PERSONS CONVICTED BY THE COURTS IN INDIA.*(1st June, 1916.)*

THE DRAFT is no doubt in order, but the points in which
 Home Department Proceedings I am interested are quite dif-
 Judicial A, July 1916, Nos 161-62. ferent and will, I think have
 (Legislative Department unofficial
 No. 256 of 1916.) to be considered at some time.

It will be noted that the power delegated to the Viceroy is not merely that of granting a free pardon, as to which probably little difficulty will arise, but of granting a pardon upon conditions. This in England has usually been exercised in the case of death sentences "upon condition of imprisonment", and to this extent the power seems to overlap the provisions of Chapter XXIX of the Code of Criminal Procedure. Of course if His Excellency does not propose to exercise the power of conditional pardon no difficulty will arise, but supposing he wished to do so, it is not altogether easy to see how the condition would be enforced in India. In England it is enforced under a special statutory provision, II Geo. IV and I Will. IV, C. 39, S. 7.

The power of conditional pardon, it will be seen, practically gives His Excellency an unlimited power to commute any sentence of a criminal court, and it may be difficult to know exactly how petitions for mercy should now be treated, *viz*, whether as petitions to the Governor General in Council under Chapter XXIX of the Code or to His Excellency as the depository of the Royal Prerogative.

When the Code is amended it would perhaps be as well to bring Section 401 (5) into line with the new powers of the Viceroy, which will, I presume, find a place in all future Royal Warrants.

No. 18.

MADRAS TOWN PLANNING BILL.

(10th June, 1916)

I MUST confess to grave doubts whether a Town Planning Act of considerable complexity is suited to the Municipalities of the Madras Presidency, and I fear that there will be considerable risk of the Bill if it is passed into law becoming for this reason, a dead letter. I should have thought myself that it would have been wiser to commence with something far less complicated. The Bombay Act was, I believe, mainly intended for the development of Salsette which is rapidly becoming a suburb of the city, and the practical experience gained in Bombay itself under their Improvement Act of 1898 gives them a great advantage. I also feel that with regard to a number of the provisions embodied in the draft Bill the framers are to a great extent groping in the dark. If the Bill is proceeded with, many of the clauses will require very careful consideration in the local Council, and I cannot help hoping that it may be found possible to simplify the whole procedure to a material extent. I have myself spent a considerable time in checking the various clauses, but I am by no means satisfied that I fully understand the working of many of the provisions of the Bill.

The omission of the 15 per cent, allowed by the Land Acquisition Act as a *solatium* for the compulsory nature of the acquisition raises an important question of principle. I am naturally unwilling to enter into the discussion of a matter which has already been considered by two of my Hon'ble Colleagues, and between whom (as I understand) an agreement has been arrived at, but I feel that I ought not to let it pass unnoticed, especially as I have personally had a considerable experience of the working of the Bombay Improvement Act, and the hardships which were entailed there owing to a similar omission.

I quite agree in the first place that there is a great difference in principle between an Act which deals with the clearing out of insanitary slums, and one which is intended, primarily at all events, to control the development of new building areas. In the one case the penal provisions of the Act may often be justified by the past neglect of the property owners; in the other no such considerations would apply, and the only justification for depriving property owner of any portion of their natural rights would be the modern,

but to my mind, revolutionary ideas of the nationalisation of all land.

Under section 24 *secondly* of the Land Acquisition Act the compensation to be paid to the landowner is to be ascertained without taking into consideration "any disinclination of the person interested to part with the land acquired," and this provision is embodied in clause 14 (3) (b) of the Madras Bill. This means that the basis of compensation is in every case to be not the value to the owner, but the value to an outside purchaser, which is usually spoken of as the "Market value". It is obvious however, that there may be a very great difference between these two values, and it is because the former is to be altogether disregarded that the additional 15 per cent, has been allowed. I do not deny that there would be many cases in which the property to be acquired would have no special value to its owner, and that therefore the 15 per cent *solatium* would not be required, and it may therefore well be that a general provision to this effect is extravagant. But if it is to be omitted altogether it is in my opinion grossly unjust to disregard *in toto* the consideration of special value to the particular owner.

I will illustrate my meaning by two typical cases which I remember under acquisition proceedings in Bombay.

- (a) There was a magnificent Hindu family house situated in a poor quarter of Bombay, through which it was proposed to run a new road, and it was necessary to acquire the house for the purposes of the scheme. The structure itself was a fine specimen of native architecture probably a century and a half old, of the most massive construction, full of carved woodwork, and in itself by no means insanitary. The family to whom it belonged had lived in it for generations and were living there up to the moment of demolition, though the district in which it was situated had for some time before degenerated into a non-residential quarter. The principle of valuation adopted was, no doubt quite rightly, the rental basis without regard to original cost. This question has been much debated in compensation cases, and it is now established beyond dispute that the rental basis is the only principle upon which "market value" can be assessed in the case of town properties. The result however in this particular case was that an old family was deprived of its ancestral home, and as "compensation" for a structure which was worth intrinsically well over Rs. 2,00,000, they received, upon a correct assessment under the Act

about Rs. 80,000 It is obvious here that the " market value " was altogether out of proportion to the " value to the owner ", and the 15 per cent *solatium* not being allowed, the result was really not compensation but confiscation.

- (b) A wealthy and shrewd landowner in Bombay bought up a quantity of waste land in the north of the island which he believed would eventually, though no doubt at a distant date, become valuable as building land. He paid a fair price for it on the basis of its having some hypothetical value and was content for 10 or 12 years to receive an altogether inadequate return upon his investment by letting out a few plots here and there to petty vegetable growers, leaving the rest wholly unproductive, with the reasonable expectation of getting a fair return upon his capital when the land could be developed for building purposes. Before the time for this arrived, the new Harbour Railway Scheme came into operation, and a large part of the land was required for public purposes. It had hardly appreciated in value since the time of its original purchase, and if the proceedings had not been under the Land Acquisition Act which allowed the 15 per cent the property owner would have been deprived of the greater part of even the ordinary return upon his investment.

For these reasons, upon which I have no desire to expatiate further in this note, though there is much which might be said on the subject, I should be unwilling to allow the omission of the statutory 15 per cent unless the law allowed any special value of the property to the owner, where it was reasonably established in the acquisition proceedings to be taken into account. It was no doubt to avoid having to adjudicate upon questions of this sort, that the general provision for a 15 per cent allowance was adopted in the Land Acquisition Act. In England, in the case of all proceedings under the Lands Clauses Act, it has I believe, been customary always to allow an addition of 10 per cent over the strict market value for the same reasons, though no provision to this effect appears in the Acts.

Clause 15 of the Bill also raises what appears to me to be a question of principle. By this clause the value of all land required for town planning schemes is to be presumed, until the contrary is proved, to be 16 $\frac{2}{3}$ times the municipal assessment. In the first place it is very doubtful whether the municipal assessment ought to be taken to be the annual value of the land. The method of assessment will I suppose, be laid down by the new

Madras District Municipalities Act which is not before me, but assuming that the ordinary basis is adopted, the assessment will no doubt be upon the fair annual letting value minus 10 per cent (or some other fixed proportion) for repairs, etc. The fixing of this fair annual value is practically always in the hands of the municipal authorities, and I can well imagine that if an acquisition scheme was in contemplation the assessments would be kept at as low a figure as possible. Apart from this, however, it is well-known that assessments frequently are, without any impropriety on the part of the property owner, fixed below the real annual value and ignorant owners, and in particular Hindu widows and minors, who know nothing whatever about the principles of assessment ought not to be penalised in cases where the property is to be acquired by the municipality, by reason of the assessment having been fixed too low.

In the second place it seems to me to be altogether illogical to take $16\frac{2}{3}$ years' purchase as a universal standard. This translated into less technical language means that the investment is to be treated as one expected to bring in 6 per cent ($100-6$). It is obvious however that even in municipal areas the rate of return expected from land will vary very greatly. No doubt for rented house property 6 per cent is a not unreasonable standard, but for agricultural land (which is usually taken at $2\frac{1}{2}$ to 3 per cent in England) a much lower return is nearly always accepted, and it probably would not be unfair to take a 4 per cent standard for it (25 years' purchase), and a similar standard, or one very little higher, would frequently represent the normal in the case of house property held by the owner as his private residence.

No. 19.

EXEMPTION OF BANK DEPOSITS FROM INCOME-TAX
(19th June, 1916)

THERE is in my opinion nothing in the Act¹ which makes it obligatory upon any person to make a return of his income under Part IV. It would be an altogether unjustifiable straining of language to hold that such a duty was imposed by a rule made under section 18 (c). The "invitation" there referred to is clearly one that may be declined at the will of the person to be assessed.

I cannot help adding that I hope my Honourable Colleague will reconsider his apparent veto upon the raising of the question referred to in paragraph 8 of Mr. Brunyate's² note of 7th June 1916. It is surely of the essence of all income-tax legislation that the assessment should be fair and uniform, and this is exactly what it is not in India at the present time. Now that the tax has been largely increased the unfairness becomes more marked and is sure to cause increasing dissatisfaction. Under the present system not only do many investors escape payment of the tax, but a great commercial advantage is given to Banks and Companies which accept private deposits over other industrial concerns, and the result must be to encourage such deposits (upon which it is said openly that income-tax need never be paid) at the expense of other equally deserving enterprises. If we want to encourage industrial developments in India with Indian capital, we surely cannot afford to handicap a company that carries on its business in the ordinary way, and this is what we are doing to a great extent under our present income-tax law. If a man invests in the shares or debentures of a company he pays income-tax (or the company pays it for him) on his investment. If he deposits his capital with a bank, or with some company which receives deposits, he in nine cases out of ten pays no income-tax, and no "tightening up of executive regulations" will alter this to any appreciable extent. It may be that the Finance Department do not want to harry the Banks more than they can help in these times, but is this a sufficient reason to give the Banks an unfair advantage over other commercial concerns? After all the Banks are not philanthropic institutions; they only receive deposits in order to turn them to account, and as a matter of fact they do exceedingly well by them even in these times. But in any case it may be that in practically exempting Bank deposits from income tax, we are paying a very heavy price

¹Indian Income-tax Act, 1886.

²Secretary in the Finance Department.

for keeping the Banks in a good humour Can the Finance Department give us any idea of what that price is ? Most of the Banks at all events publish their accounts. These should show what the total of Bank deposits was in any given year, and the income-tax returns should show what proportion of this escapes the payment of the tax. If we had some figures of this sort before us, there would be some basis upon which to consider the merits of the question so far as the Banks are concerned.

But if the Banks have some claim to special consideration what claim have the private companies who receive deposits ? When I was in Bombay, it was common knowledge that many of the mill companies received deposits on a very large scale, and that a great part of their business was carried on by this means, with the result that they were able to avoid the issue of debentures in most cases altogether, and were often enabled to carry on with only a very moderate share capital. I can conceive no reason why we should have any tenderness for these companies, or why such deposits should be treated in any way differently from debentures.

I regret that my note has run to such length, but the question is to my mind one of great importance. I agreed to its being shelved last March when we had no time to tackle it, but I think that it would be a great mistake to postpone it indefinitely until that far future when the whole Income-tax law is to be revised.

No. 20.

DISTINCTION BETWEEN A CO-OPERATIVE SOCIETY AND
A COMPANY AS DEFINED BY THE LAND ACQUISITION
ACT, 1894.

(19th June, 1916.)

I HAVE nothing to add to the preceding notes as to the evolution of the present restriction of the Land Acquisition Act to companies as therein defined. (Legislative Department unofficial No. 399 of 1916.)

But we are asked by the Revenue and Agricultural Department (see the Hon'ble Mr. Hill's¹ note of 11th June) whether Co-operative Societies are sufficiently *analogous* to Companies, in whose favour the provisions of the Act can be put into force, to justify an extension of it to them, and on this point I think the answer must be in the affirmative.

Registered Co-operative Societies are corporations (see section 18 of the Act of 1912), and if each Society were incorporated by a special Act instead of being incorporated *under* a general Act, they would clearly be within the definition of a Company in section 3 (e) of the Land Acquisition Act. Again, except for the special provisions of section 48 of the 1912 Act, all Co-operative Societies would have to be registered under the Companies Act. There would, therefore, seem to be no distinction in principle between a Co-operative Society and a Company as defined by the Land Acquisition Act

If any "company" therefore is legally competent to take advantage of the provisions of part VII of the Land Acquisition Act, I can see no very definite reason why a Co-operative Society should not enjoy the same privilege. Whether in a particular case compulsory acquisition should be allowed or not would (as in the case of a company) depend upon whether the conditions of section 40 of the Land Acquisition Act were complied with.

I think, however, that we should not lightly extend the provisions of the Land Acquisition Act to Co-operative Societies, which, though their ultimate objects may be the general public good, are yet essentially associations of private individuals co-operating primarily for their individual interests. Any acquisition of land, therefore, by such a Society would necessarily be for the immediate advantage of the members personally, and only indirectly for the public benefit. I would at all events before embarking on legislation circulate to Local Governments and ascertain if the difficulties experienced in the United Provinces

¹Revenue Member.

have been found to be a practical obstacle to the development of the movement in other parts of India.

It is also to be borne in mind that under the existing state of affairs if the Local Government think it necessary in the public interest to establish a seed or other agricultural depot in any district, it is open to them to acquire land for the purpose under the Act, and to hand over the management of it to a local Society. Having regard to the working of part VII of the Land Acquisition Act this would probably involve less difficulties than an acquisition by the Society itself.

I only desire to add that, if after full consideration it is thought advisable to amend the Act so as to bring in registered Co-operative Societies, I do not think that the necessary legislation could be reasonably objected to as contentious. It would be only curing a technical defect in the definition of a "Company" which could, I think, be done by inserting in section 3 (e) after the words "Parliament or" the words "by or *under* an Act."

No. 21.

STATUS OF THE KHAN OF PHULERA AND THE AMENDMENT OF SECTION 86 OF THE CODE OF CIVIL PROCEDURE

(20th June, 1916)

THERE can, I think, be no doubt, that the Khan of Phulera is not a Ruling Chief, and in my opinion the petitioners should be so informed. This is the only question which arises directly on their petition. Whether their suit will lie or not in the British court will depend upon whether the cause of action arose, as they allege, within its jurisdiction, and this will have to be decided in the ordinary course by the District Judge

Foreign and Political Department
Proceedings Frontier A, July 1916,
Nos. 1-2.
(Legislative Department unofficial
No. 404 of 1916.)

I agree with Secretary that it is very desirable that on questions as to status under section 86 of the Civil Procedure Code, the procedure he refers to should be adopted - see per Lord Esher M. R. in *Mighell versus Sultan of Johore* (1894) I. Q. B. at page 153. The effect of this decision was that in England Judges were bound to take judicial notice of the status of a foreign State, and of matters stated in the certificate of a principal Secretary of State (see *Taylor on Evidence*, 10th Edition, pages 3 and 15). At the same time it is at least doubtful whether section 57 of the Indian Evidence Act is wide enough to cover such a case, and indeed whether such a certificate is admissible at all in evidence under that Act. It is also noteworthy that in *Kambhai versus Himatranigji*, I L.R., VIII, Bombay 415, the High Court refused to act on the opinion expressed by Government on a similar point. It is, I think, very undesirable that any question as to the political status of a Chief should be canvassed in our courts, with the possibility of an awkward decision being recorded. The matter is clearly one to be decided by the paramount power as a question of State, and I think that it would be desirable to amend section 86 of the Code making the certificate of a Secretary to Government both admissible in evidence and conclusive on the point.

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No. 22.

INTERNMENT OF PRISONERS OF WAR IN BRITISH INDIA.

(24th June, 1916)

I QUITE agree that there is sufficient authority for the proposition that a prisoner of war in British India may be dealt with under the municipal law of the land, but it must be remembered that the cases referred to by Secretary

Army Department Proceedings Special and Miscellaneous B, War, 1916-17, Nos. 24310—24313.

(Legislative Department unofficial No 420 of 1916.)

were all decided before the Hague Peace Conference of 1899, Article 8 of which lays down that prisoners of war shall be subject to the laws, regulations and orders in force in the Army of the State into whose hands they have fallen, and this, I take it, means that they are to be treated exactly as if they were members of our own Army. I think, therefore, that it would be safer under the circumstances to act under Article 5 of the Conference which allows a prisoner of war to be confined "as an indispensable measure of safety" If the Army Department are satisfied that the confinement of this means is indispensable, as apparently they are, they are entitled to confine him in any place they like, and there is nothing which would prevent their selecting a jail for this purpose, if it is the most convenient place. The actual order for confinement should be a military warrant addressed to the officer in charge of the jail (*cf.* section 107 of the Indian Army Act) who should also be authorised to receive him by the Local Government, and it should be clearly recognized that his confinement should be as a prisoner of war, all reasonable privileges accorded to such prisoners being allowed him, so far as may be consistent with such confinement.

No. 23.

(I—II)

PROPOSED REPEAL OF SECTION 32 (2) OF THE GOVERNMENT OF INDIA ACT, 1915.

(Right of Indian Subject to sue the Secretary of State. Decision in the Moment Case.)

I.

(26th June, 1916.)

I CAN see no merit whatever in the present proposal—from our point of view. Having regard to the pronouncement that has been made in India I do not see how we could possibly take up immediately such a very controversial piece of legislation as the repeal of section 32 (2) of the Government of India Act if the Home Government merely empowered us to do so. Moreover the chances are that even this new proposal of the Secretary of State, which only shifts the onus of making the change on to us, knowing that we must do it, will cause a good deal of feeling in Parliament, and this will certainly accentuate the controversy in our Legislative Council. Nor do I think that we can safely let the matter stand over till after the war, as we may be faced at any time with some other impasse like Moment's case. I also agree with Secretary that on principle a constitutional change of this sort (for the question as it now stands is undoubtedly a constitutional one) ought to be made by Parliament and not by the Indian Legislature.

It is not easy to foresee how far a simple repeal by us of section 32 (2) would really safeguard our position in India. It would, I think, take away the private rights of suit which are in effect given by the section as it now stands; but the effect of the Privy Council's judgment in the Moment case was not merely to lay down that the respondent's rights of suit against the Secretary of State remained notwithstanding the provisions of the Burma Act, but that the latter were *ultra vires* and therefore void, and the mere repeal of section 32 (2) would not in any way validate either those particular provisions or the provisions of other Acts infected with the same vice. In any case I feel no doubt that it would be much safer for us to have a provision such as that of clause 2 (d) of the Bill which would validate all existing Acts of the Indian Legislature, and I think that we ought to express ourselves strongly to this effect.

II.

14th August, 1916

THE subject is one of such importance that I think, it is only reasonable that the Secretary of State should advise us as to what course we should now adopt. The judgment in the *Moment* case makes it clear that any provision of an Indian Act which prevents a subject from suing the Secretary of State in a civil court in any case in which an action would have lain against the East India Company is *ultra vires* and that the furthest that we can go in Indian legislation is to regulate the procedure under which the action may be brought. Subject to any instructions we may receive from the Secretary of State, I think that we must now accept this loyally as a final legal pronouncement upon our legislative powers. What particular provisions in existing Acts may come within the ban of this judgment it may not be easy to say, and I think that we must wait and see how the courts apply it in other cases.

For instance, section 39 of the Income-tax Act (II of 1886) provides that "no suit shall lie in any civil court to set aside or modify any assessment made under this Act." Supposing the Collector recovered by summary process under section 30 of the Act from a recalcitrant assessee double the amount of the assessed tax, and the latter sued the Secretary of State on the ground that the assessment was excessive and claimed to recover the excess, would section 39 be an answer to the action? Or would the Court hold that section 39 was *ultra vires*? There might be various arguments in favour of the validity of the section despite the judgment in the *Moment* case, and it certainly would not be safe for us to assume that it was *ultra vires* until the actual question had been tried, and possibly not until it had been carried to the Privy Council itself, but it is obvious that we should be greatly hampered in our collection of the tax if the point were once raised, and we might be subjected to an infinity of suits in the meanwhile.

Another class of enactments which may be affected by the decision of the Privy Council is to be found in our revenue legislation which frequently bars suits on revenue questions in the civil courts. See section 4 of Act X of 1876, the Bombay Revenue Jurisdiction Act, which provides that, subject to certain exceptions, "no civil court shall exercise jurisdiction" in the matter of "claims against Government" relating to various specified heads. Such a provision as this would seem to be clearly within the mischief of the decision referred to. If on further consideration this view is confirmed, we ought, strictly speaking, to repeal it, as I doubt if any responsible government ought to keep on their Statute-book

any enactment which they are satisfied they had no power to pass. It would, I think, be important that the Secretary of State should advise us what course we ought to pursue with regard to such enactments as this.

Another somewhat similar and possibly typical provision is the Santhal Parganas Settlement Regulation III of 1872, section 5 of which says that from a certain date "no suit shall lie in any civil court established under the Bengal Civil Courts Act, 1877, in regard to land or any interest arising out of land or with regard to the rent or profits of any land, etc.," all such suits being relegated in effect to the settlement courts. In such a case as this the fact that there is another court in which such suits may be brought would perhaps differentiate the case from the one decided by the Privy Council, by reducing the question to one of procedure only. See the remarks of Lord Moulton during the argument of the *Moment* case. But there can be no doubt that section 5 of the Regulation takes away the remedy of the subject in the ordinary civil courts of the country, and it is quite conceivable at all events that this might be held to be within the principle as well as the letter of the Privy Council's judgment. In such a case as this, if it were to be so held, the somewhat extraordinary result would follow that the Secretary of State could be sued in a land case in the ordinary civil courts, but no one else could. There are probably many other similar provisions in land revenue Acts, and if the point were raised by a claimant Government would no doubt be bound to contest it. But if the question of jurisdiction were decided here in a plaintiff's favour it might be very difficult for us to get it up to the Privy Council, and in the meantime the whole of our revenue procedure might be entirely dislocated. I think therefore, that this also is a case which may be suggested for the consideration of the Secretary of State.

Then again, there are numerous provisions scattered through our Acts which provide that "no suit shall lie in any civil court against the Secretary of State for damages for any act in good faith done or ordered to be done in pursuance of" a particular Act or any other law of a like nature. See for a recent instance of this, the Bengal Excise Act, 1909 (Bengal Act V of 1903), sections 91 and 92, from which the above quotation is taken; and *cf* section 27 of the Bengal Medical Act, 1914, which provides that "no suit or other legal proceeding shall lie in respect of any act done in the exercise of any power conferred by this Act on the local Government." It is by no means easy to say whether such enactments as these come within the mischief of the *Moment* case. It may no doubt be said on the one hand that inasmuch as the Act in question empowers Government officers to commit what would otherwise be wrongs, no action would ordinarily lie against them even apart from the

specific provisions referred to ; see per Lord Blackburn in *Geddis v Proprietors of Bann Reservoir*, 3 A C at pages 455 and 456. But on the other hand, if the Privy Council judgment means that the Government of India have no power to pass any Act which has the effect of preventing a subject from suing the Secretary of State in any case in which he could have brought an action against the Government of the East India Company, it would at all events be no very forced deduction from this to argue that any enactment which must necessarily have this effect is itself to that extent *ultra vires*. How far this argument can legitimately be carried is of course doubtful. But it is at all events clear that it opens up a wide field for the ingenuity of legal practitioners, and an adverse decision upon any Act may land us in unforeseen difficulties. It is also worth noticing that similar provisions to those referred to, find place in some of the Colonial Acts, a very recent instance of which will be found in the New South Wales Meat Supply Act, VI of 1915, section 9 of which bars all proceedings against the Crown for the recovery of damages in respect of anything done thereunder. Cf also section 19 of the Canadian Government Railways Act, XXXVI of 1906.

There is only one other type of provision to which I need refer specifically, but it is one that we have had to resort to frequently in the course of our war legislation, I mean what may be called "compulsory arbitration" clauses, for instance, under rule 11 (1) of the Defence of India (Consolidation) Rules, which under Act IV of 1915, section 2 (3), are to have effect as if enacted in that Act, Government are empowered to take up any machinery or tools which they may require, the owner being entitled to no compensation except what may be fixed by a Government arbitrator, whose decision is to be final. A somewhat similar provision is to be found in the New South Wales Wheat Acquisition Act, XXVII of 1914, section 5. Any enactment of this nature would seem clearly to bar what may be called the common-law rights of the subject which he might have enforced in the ordinary civil courts against the East India Company prior to 1858. But if it is *ultra vires* for the Government of India to pass any enactment of this sort, it is obvious that we should be greatly hampered in any future war legislation that we have to undertake, and shall be met with an infinity of claims after the war which it may be very difficult for us to meet.

The preceding paragraphs do not of course pretend to be an exhaustive examination of the various classes of cases which may be affected by the decision of the Privy Council ; but there is enough in the particular points to which I have referred to show that the recent decision of the Secretary of State not to legislate, presumably until after the war, leaves us in a very difficult position and I think that it is not unreasonable, therefore, to ask for his

advice as to the policy we should now adopt as to both past and future legislation. If he had warned us that the clause would have to be dropped (which his various communications on the subject certainly did not lead us to expect), we might have suggested that at all events all existing enactments, except the Burma Act which was the actual subject of the Privy Council judgment, should be validated, leaving over the question of our future powers for consideration after the war. Seeing that no complaint had ever been made with reference to other existing enactments this could hardly have been objected to in Parliament, and it would at all events have relieved us of much of our present anxiety.

No. 24.

THE RECEPTION AND DETENTION IN BRITISH LUNATIC
ASYLUMS OF LUNATICS FROM NATIVE STATES*(4th July, 1916).*

SECTION 98 will only apply where an order for reception or detention had been made by a Court or Tribunal upon whom jurisdiction has been conferred by (in effect) the Governor-General in Council. There can, I think, be no doubt that neither

Foreign and Political Department
Proceedings General A., August 1916,
Nos. 34—39

(Legislative Department unofficial
No. 450 of 1916.)

His Majesty nor the Governor-General in Council has any inherent jurisdiction over Native State lunatics. Before therefore jurisdiction can be conferred on the political officers it must be ceded to the Crown by the Native State in question. If they wish us to undertake the custody of their lunatics, it is clear that they must cede to us jurisdiction over them (or over particular classes of them) in the States themselves so that an order for detention can be made by a British officer. The jurisdiction must I think be ceded generally or in respect at least of particular classes of lunatics and not in respect of an individual lunatic.

No. 25.

EXERCISE OF JURISDICTION OVER BRITISH INDIAN
SUBJECTS COMMITTING OFFENCES IN BHUTAN.*(12th July, 1916.)*

THERE is nothing in the treaty engagement between us and Bhutan to prevent the Bhutanese authorities from trying British Indian subjects arrested in Bhutan for offences committed in Bhutan. I also agree that we are not bound to surrender to Bhutan British Indian subjects who after committing an offence in Bhutan have taken refuge in British India. Such persons, can, however, be tried under section 188 of the Criminal Procedure Code at any place in British India at which they may be found.

Foreign and Political Department
Proceedings External A, July 1916,
Nos. 1—2.

(Legislative Department unofficial
No 474 of 1916.)

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No. 26.

PROPOSED CANCELLATION OF THE SANAD OF THAKUR
GOPAL SINGH OF KHARWA AND FORFEITURE OF
HIS ESTATE TO GOVERNMENT.

(13th July, 1916.)

THE Thakur of Kharwa is apparently a British subject, and any claim to confiscate his estate must accordingly be justified by British Indian law.

Foreign and Political Department
Proceedings Secret I., March 1917,
Nos. 1—29.

(Legislative Department unofficial
No. 921 of 1916.)

There can be no question of an act of State, such as was held to justify the seizure of the Raj of Tanjore in 1855 (see 7 Moore's Ind. Appendix 476). There is also no question of confiscation under the Penal Code; but the suggestion is that he holds his estate from the Crown upon a condition of loyalty, and that on breach of this condition the Crown can resume. This question is of course one within the cognisance of the municipal courts of the country, and Government would have to defend its claim upon legal grounds.

By the Treaty* of the 25th June 1818, the then Maharaja Scindia transferred to the British Government all his rights and claims of every description to *inter alia* the district of Ajmer, including Kharwa, which was thenceforth administered as a part of British territory. If this is to be regarded as a cession of sovereignty by one independent sovereign power to another (as I think must be the case) the only legal and enforceable rights which the then Thakur would have had as against his new sovereign would be: "those and only those which that new sovereign by agreement, express or implied, or by legislation chose to confer upon him." (Secretary of State for India v Bai Rajbai, L. R., 42 Ind. Appendix at page 237). So in a case from South Africa it was laid down that—

"The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State, and treating Sigcau as an independent sovereign—which the appellants are compelled to do in deriving title from him, it is a well established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer.

It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of

international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure". See *Cook v. Sprigg*, L. R. 1899, Appendix Cases, 572—578. This doctrine has been accepted by the Privy Council as applicable to India, see the case cited above from 42 Ind. Appendix.

There can be no doubt that at the time of the cession of Ajmer the British Government found a considerable class of persons in possession of estates under the title of Istimrardars, whatever that title may have then connoted. Upon the view of the case taken in the preceding paragraph, it was clearly open to Government to impose any conditions they liked upon the continuation of these holdings. It is clear, I think, that we did not recognise them as absolute owners of the land, as Government have imposed upon them various limitations on the right of absolute ownership. The Istimrardars, in common with the rest of British India, have been made liable to pay land revenue, and the right to enhance this from time to time was also, I think, maintained, and they have been subjected to *nazaranas* on succession. But so far as appears from any records available, Government have never resumed or attempted to resume any of their estates or definitely asserted

Rajputana District Gazetteer, their right so to do. It seems
Ajmer Merwara, Volume I (a), page 91. to have been known that the Istimrardars claimed an absolute right of ownership in the land, and at all events some of the Government officials who had to deal with them have expressed the opinion that this right had been recognized. But the fact remains that for more than 60 years (the full period necessary to acquire a title against Government by adverse possession) there has been no attempt to disturb either the Thakur of Kharwa or any of his fellow Istimrardars. Moreover, when the Sanads were granted in 1873† (before any title of adverse possession could have been acquired) and there was an obvious opportunity to assert the claim of Government that the Istimrardars were only permissive holders subject to good conduct, a condition to this effect was apparently of set purpose omitted from the Sanads.

The argument on behalf of Government would no doubt be that Istimrari holdings before the cession were in the nature of Jaghirs which were originally only life grants requiring renewal on every succession, such holdings being always dependent on good conduct, and that the British Government only acquiesced in a continuance of the holdings upon these terms. The exaction of *nazaranas*

would no doubt afford some support to this view, but I doubt if it would be a sufficient basis for the claim, and there would be little else to support it. The Sanads themselves certainly do not do so. Even if some of the Istimrardars were of opinion that the power of resumption existed, this would hardly be proveable as against the Thakur of Kharwa nor would the fact* that he had made a similar claim against one of his subordinate holders be of any material weight.

*Cf, pages 27-28 ante

On the whole, I think that if the case came into court, there would be considerable likelihood of it being held—

- (1) that Government had from the date of the cession impliedly agreed to the Istimrardars continuing in possession as owners of their estates subject only to the payment of a succession *nazarana* and land revenue upon the usual terms, and
- (2) that they had in any case acquired a right so to hold by adverse possession.

Under these circumstances I think that it would be most inadvisable to confiscate the estate in question. On the one hand the Thakur would be quite certain to file a suit, and even if he failed in the local courts he would probably be able to take it up to the Privy Council with, in my opinion, at least a fair prospect of ultimate success. On the other hand, it seems to me that Government can attain their object equally well and without risk by other means.

All that the Foreign and Political Department want, is to punish the present Thakur, and to emphasise the fact that the reason for such punishment is his disloyalty. But there would seem to be no desire to resume the estate permanently. This result can, I think, be adequately attained by putting in force the provisions of section 9 of Bengal Regulation III of 1818 which has been applied to Ajmer, (see the Ajmer Code, page 17). The notification of an order under this section would give sufficient publicity to the Thakur's disgrace, and under it he could in effect be deprived for life without prejudicing the interests of his successor, while if he agreed to abdicate, the estate could be released. If further punishment were required, his Sanad could be cancelled, and the land revenue enhanced, and if subsequently thought desirable a further Sanad could be issued to his successor. I do not quite understand why the Advocate-General in the last sentence of his Opinion doubts if it is worth the while of Government to do this. The withdrawal of a Sanad is always regarded as a mark of disgrace, and the effect at all events would be to reduce the income of the estate during the present Thakur's life-time.

No. 27.

INTERPRETATION OF SECTION 105 OF THE GOVERNMENT [OF INDIA ACT, 1915, READ WITH SECTION 32 (1) OF THE INTERPRETATION ACT OF 1889.

(Appointment of an acting Chief Justice or an Acting Judge of High Court.)

(17th July, 1916.)

I HAVE no doubt that there is power to appoint an acting Home Department Proceedings Chief Justice or an acting Judicial Deposit, August 1916, No 24. Judge "whenever a vacancy (Legislative Department unofficial occurs", but I doubt if this No 370 of 1916.) disposes of the more difficult aspect of the question. I do not think that under section 105 (1)¹ a Judge appointed to perform the duties of the Chief Justice is a "Chief Justice," or that under 105 (2)¹ a person appointed to act as a Judge is a "Judge," within the meaning of the section. If, therefore, either an Acting Chief Justice or an Acting Judge dies before the substantive appointment is filled, a vacancy does not thereupon occur in the office of the Chief Justice or of the Judge; the only vacancy is the one which occurred originally upon the occurrence of which the acting appointment was made.

We are of course bound by the opinion of the law officers at home given upon section 7 of the Act of 1861,² that once an appointment has been made "on the happening of a vacancy" the power is exhausted, if and so far as that opinion is applicable to section 105 of the Act of 1915.¹ The substitution of "occurrence" for "happening" cannot, I think, make any difference but it is a question of some difficulty whether the application of section 32 (1) of the Interpretation Act has not altered the position. That section provides in effect that powers granted by an Act may be exercised as often as occasion requires, unless a contrary intention appears. There is no doubt that in the case under consideration the power to appoint comes into existence when the particular event happens, i.e., on the occurrence of a vacancy, and it is at all events not an unreasonable view that the effect of the Interpretation Act is to say that the power having come into existence may be exercised as often as occasion requires. It may be however that the real question is whether the words of the

¹Government of India Act, 1915.

²Indian High Courts Act, 1861.

section do not show a contrary intention inasmuch as they suggest that the power is only to be exercised on the occurrence of a vacancy. The wording of the re-enactment is, I think, unfortunate in view of the previous opinion of the law officers, and I think there must be some doubt upon the point. But on the principle *ut res magis valeat quam pereat*, I consider the sounder interpretation to be that the words "on the occurrence, etc.," only mark the coming into existence of the power, and that having come into existence it can, under section 32 (1) of the Interpretation Act, be exercised as often as occasion requires.

No. 28.

“ PERSONAL LAW ” IN REGARD TO MARRIAGE, AND MIXED MARRIAGES.

(26th July, 1916.)

THE QUESTIONS raised by the Bishop of Calcutta's note are Legislative Department Proceedings somewhat complicated, and B., July 1916, No 63. they have not been made easier by some of the previous discussions in the Government of India and the law courts.

As to the meaning of the expression “ personal law ” in section 88 of the Act¹ of 1872, I can only say that in my opinion the personal law of every member of a native Christian community is the body of customs which the community has adopted, many of which would probably have been derived from their religious preceptors, though this does not appear to have been the view

**Vide* Whitley Stokes' ² Minute of always taken [in this office 24th May 1878, Compilation, page 23 or elsewhere *]

The personal law of an Englishman domiciled in England is the English law, under which marriage with a niece is, and before 1907 marriage with a deceased wife's sister was, illegal and void. This would be so not because the Church of England considered such marriages to be against the law of God, but because the law of the Church had been adopted as a part of the law of England. See *per* Lord Cranworth in *Brook versus Brook*, 9 H. L. C., at page 226.

In the case of a Roman Catholic community their personal law would, on a question of marriage, probably be the law of the Roman Catholic Church, because of the probability that the community had adopted it. This, I think, is the *ratio decidendi* of *Lopez versus Lopez*, 1 L. R. 12 Cal. 706 [quoted in paragraph 6 of the Secretary of State's confidential despatch of the 6th October 1911, which communicated to us the opinion of the law officers at home]. In the absence of specific evidence on the point, I think that the courts would presume in such a case that the law of the church had been so adopted; but it would in my opinion still be open to a party interested to prove a custom to the contrary. There are in many communities converts in India who have retained as part of their personal law relics of the law by which they were governed before conversion; see *Abraham versus Abraham*, 9 Moo. I. A., 195.

¹Indian Christian Marriage Act, 1872

²A former Law Member.

So, too, in the case of an Indian Christian community following the doctrines of the Church of England, I think that the presumption would be that they had adopted as part of their personal law the marriage law of their church, but proof of a contrary custom would still be admissible (*Lopez versus Lopez* above at page 722) at all events provided the custom was not wholly inconsistent with Christianity, as a custom of polygamy would be (*Hyde versus Hyde*, L. R. 1 P. and D. 130), or of marriage incestuous by the general consent of Christendom (*Brook versus Brook* above, *per* Lord Cranworth at pages 227-8, and see *In Re Bozelli's Settlement*, 1902, 1 Ch at 755). I think for instance that a custom would be provable allowing marriage with a niece which is allowed in the Lutheran Church (*Brook versus Brook* above), or with a deceased wife's sister

Speaking generally, then, I think that with regard to marriage the personal law of any native Christian community would be the law of the church whose tenets they had adopted, subject to such customary modifications as could be proved to have been adopted or retained by them.

Coming now to the particular question dealt with in the Bishop's note, in which (he tells me) he is concerned mainly with native Christian communities, if the canon law of the Roman Catholics absolutely prohibits mixed marriages, as the Bishop suggests, or (as I think to be a more correct statement of the case*) declares all marriages where one party is a Roman Catholic to be invalid unless performed by a Roman Catholic priest and according to the rites of that Church, and if there is no reason to believe that any customary variation of this rule has been adopted by any Roman Catholic native Christians in India, I think that section 88 of the Act would apply to a marriage where one party was a Roman Catholic which was solemnized (for instance) by a clergyman of the Church of England, and the fact that the formalities prescribed by the Act for such marriages had been complied with would not validate it.

It does not, however, necessarily follow from the application of section 88 that under these circumstances the marriage would be void. All that the section says is that the Act will not validate it; and the question remains to be considered whether an

*See the decree of the Council of Trent "*de reformatione Matrimonii Tamest*," *Sessio XXIV*. "If any one attempts to contract marriage other wise than in the presence of the Parish Priest or of some other Priest authorised by him or the ordinary, the Holy Synod renders such an one wholly incapable of so contracting and declares such contract null and void" The "*ne temere*" decree was, I believe, only intended to be an exposition of this decree of the Council of Trent.

absolute prohibition in the personal law of one of the parties would have the effect of making the marriage void. It was apparently so laid down in *Mette v. Mette*, in 1859, 1 Sw. & Tr 416 and 423 ; and it may be that section 88, which certainly seems to suggest this view, took its colour from this decision. So far as I know, however, the dictum of Sir C. Cresswell in that case has never been re-affirmed, and very shortly after the passing of our Act the opposite view began to find favour. So, in *Sottomayor v. De Barros*, L. R. 3 P. D. 1, where the question was as to the validity of a marriage between first cousins performed in England between two (as it was then supposed) domiciled Portuguese, who by the law of their domicile (*i.e.*, their personal law) were incapable of marrying, though the appeal court held that the marriage was for this reason invalid, they specifically confined their decision to the case where *both* the contracting parties were at the time of their marriage domiciled in a country the laws of which prohibited their marriage (per Cotton, L. J., at page 6). But when the case came before the courts again, and it was proved that though the woman was domiciled in Portugal (so that her personal law forbade the marriage) the man was domiciled in England, the previous decision was reversed, and the marriage held to be valid, L. R. 5 P. D. 94 ; see also *Simonin v. Mallac*, 2 Sw. & Tr. at pages 84 and 85, and the recent case of *Ogden v. Ogden*, (1908) Prob 46 and in India, *Lucas v. Lucas*, I. L. R. 32 Cal. 187 [the judgment in which was approved by the law officers at home (see paragraph 5 of the despatch referred to above)]. It is true that both in the Indian case cited and in *Sottomayor v. De Barros* the disability was under the personal law of *the woman*, but I doubt if this is of any importance.

There is, therefore, strong authority for holding that a mixed marriage which is prohibited by the personal law of one of the parties is nevertheless valid in law even where the personal law of the disabled party would treat such a marriage as incestuous (*Sottomayor v. De Barros* above), and where the ground, of disability is one concerned only with ceremonial (as would I think, be the case if the canon law of Roman Catholics merely requires such a marriage to be celebrated by one of their own priests and according to their own ceremonial), I feel little doubt that a disregard of such requirements would not be held by our courts to be an essential defect, and that the marriage, if otherwise duly solemnized under the Act, would be upheld. It is a settled rule of law that though capacity for marriage depends upon the law of domicile (*i.e.*, personal law), the validity of forms and ceremonies is to be judged by the "*lex loci contractus*."

No. 29.

INSOLVENCY LAW AND PROCEDURE FOR NATIVE STATES.

(27th July, 1916)

I MUST confess to some surprise that it should be proposed to discuss a question of this nature at the coming assemblage of Chiefs, though, personally, I welcome the proposal as an attempt to clear the ground on a question of common interests between British India and the Native States. The subject is one in which, I think, the Home Department are considerably interested, and I venture to suggest that neither the Chiefs themselves nor the Foreign and Political Department would be in a position to discuss more than the barest outlines of a common arrangement without expert advice on either side.

Foreign and Political Department
Proceedings Internal A, October 1917,
Nos 23—48.
(Legislative Department unofficial
No 512 of 1916)

I quite agree with Secretary's view as to proposal of the Foreign and Political Department, but to my mind, the most useful line of discussion would be to suggest—

- (1) that in the case of any States which had or were prepared to adopt any form of insolvency law it should be agreed—
 - (a) that on production in any court in a Native State, having insolvency jurisdiction of an adjudication order made by a British Indian court, the Native State court should itself, if the insolvent were alleged to be or to have property in such State make a like order, and *vice versa*,
 - (b) that no adjudication order so made on the application of either party should be annulled except upon annulment of the original adjudication, by the court of the applying party,
 - (c) that after the making of such orders the court of each party should proceed with all despatch to realise all assets of the insolvent within their respective jurisdictions and to admit proof of debts from their respective subjects, and
 - (d) that equal distributions should be made simultaneously from the realisations by each court to creditors

proving before it, any surplus held by one being handed over for this purpose to the other as occasion may require,

and (2) that in the case of a State which did not desire to adopt any form of insolvency law it should agree to treat an adjudication order of a British Indian court as a ground for attachment before judgment of all property of the insolvent within its jurisdiction, and the same order when supplemented by a sworn certificate from the Official Assignee or the Receiver appointed by the British Indian court, of the amount of debts as a decree in his favour, and to execute the same and to hand over the proceeds of execution to him, in consideration of such arrangement we should of course agree to admit all subjects of the Native State proving as creditors in the insolvency to equal rights with other creditors in the distribution of the assets.

A similar arrangement with other States might equally be made by any State which adopted for itself some form of insolvency procedure.

I have only sketched out the above suggestion as I think it will be useful for the Foreign and Political Department to have at all events some skeleton scheme to discuss with the Chiefs. But I think that they should, before making up their minds on the point, ascertain the views of the Home Department.

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No. 30.

DELAYS IN INDIAN PRIVY COUNCIL APPEALS (PREPARATION OF RECORDS IN PRIVY COUNCIL APPEALS).

(25th August, 1916)

I HAVE kept this file for some time as various inquiries have been necessary before I could formulate my own suggestions. Home Department Proceedings Judicial A., October 1916, Nos 19—22. (Legislative Department unofficial No. 325 of 1916.) I agree generally with Secretary's note, but my proposals are of a much more revolutionary character

There can, I think, be no doubt that the principal delay occurs in the preparation and printing of the record, which is usually undertaken in India ; and unless some radical change can be effected in the methods at present adopted with regard to this no real mitigation of the evil complained of will be possible.

Before dealing with this part of the case, I think it would be as well to dispose of the minor questions with regard to which reform has been suggested—

(a) *as to the delay in obtaining leave to appeal*—I can see no objection to the existing 6 months being reduced to 90 days, which should be ample and probably all the High Courts will agree. This will necessitate an amendment by us of Article 179 of the 1st Schedule to the Limitation Act, IX of 1908 ;

(b) *delay in connection with Security for costs*—This, at present, is governed by the Civil Procedure Code, Order XIV, Rule 7, which allows an appellant for this purpose 6 months from the date of the decree or 6 weeks from the grant of the certificate, whichever is the later date. I think it is reasonable to maintain the two alternatives, though if (a) is agreed to, the 6 months should be reduced to 90 days ; the alternative 6 weeks might perhaps be reduced to one month, but this would hardly be worth doing. It would, I think, be a considerable hardship to insist on security being given in all cases in cash or Government paper, but I would provide that *ordinarily* this should be required, leaving a discretion to the Court appealed from, in cases where the enforcement of the rule would work undue hardship, to allow security in some other form ; and in such cases I would also allow the period to be extended by the Indian Court for a further two months but no longer ; this, however,

to be without prejudice to any application for further extension to the Privy Council itself, who would no doubt relegate the question to their Registrar. In order, however, to tighten up the procedure in such cases, I would provide that on any proceedings to justify security where the deposit of cash or Government paper had been dispensed with, the opposite party should be entitled to appear, but that no adjournment of such proceedings should be granted on his application or for his convenience. The above procedure can be prescribed by rules to be made by the different High Courts under part X of the Code without legislation. It would, however, be necessary that the different High Courts should agree upon a uniform practice, and this may be a difficulty; eventually we may have to suggest to them the appointment of a representative committee to consider the question. Under the above conditions a little executive pressure from the High Courts upon their subordinate courts should get rid of all undue delay in India under this head;

- (c) *delay in reviving appeals in case of death*—It is of course true that Articles 176 and 177 of the Limitation Act apply to all revival proceedings and not merely to appeals to the Privy Council; but the period limited is not for bringing legal representatives of deceased parties on the record, but merely for making an application so to do. The period of six months was introduced by Act VII of 1888 and the considerations with reference to the changed conditions of more modern times which support the shortening of the period for appeal under Article 179 would seem to apply with much the same force. I do not think that it would be unreasonable, even in India, to say that any application to bring on to the record of an existing suit or appeal the representatives of a deceased party must be made within three months of the date of his death, but the question will be mainly one for the consideration of the High Courts, and is perhaps not of very great importance. I would, however, provide that, in case of an appeal to the Privy Council, it should not be necessary to bring on to the record the representatives of any deceased party who had not appeared at the hearing of the appeal in India, but that any order which might be made in appeal to His Majesty in Council should nevertheless be binding upon such representatives in the same way as if they had been formally brought on the record;

- (d) *delay in the services of notices* — It is suggested that the only notices which need ordinarily be served on the parties in India are (1) notice of the application for certificate, *i.e.*, in effect for leave to appeal, (2) notice of admission, and (3) notice of transmission of the record. I should have thought that it would be necessary for the opposite party to have notice also of security and revival proceedings, but I know very little of the existing practice in these matters, and this also is primarily a matter for the High Court.

I now come to what seems to me to be the crucial question namely, that of delay in the preparation and transmission of the record to England, and it is here that a radical change is necessary.

In by far the greater number of cases, all the material parts of the record in a Privy Council appeal are printed twice over—once for the High Court and again for the Privy Council. In Calcutta there would seem to be really no reason for this at all, as under their rules the appeal books are printed in exactly the same form as the Privy Council records (*cf.* Balchambers' Rules and Orders of the Calcutta High Court, 1900 edition, page 28, V, and schedule A to the Rules of the Judicial Committee, page 18). In the other High Courts a different-shaped book has been adopted (folio instead of demi-quarto); but there seems to be no reason why this practice should not be changed. If, therefore, all High Court appeals were printed in the form required by the Privy Council rules, and a sufficient number of extra copies were struck off at the same time, there would be no necessity for reprinting at all. It would then only be required to print the High Court's judgment, and all the materials for a Privy Council record would be ready, and could be despatched within at all events three months from the certificate being granted by the High Court.

If the appeal book contains (as may reasonably be presumed) everything which is necessary for the High Court's decision, it is obvious that it must equally contain at least all that is necessary for the Privy Council.

When the appeal book arrives in England it would be for the agents of the parties to prepare from it the Privy Council record. The books sent over should be unbound, with each exhibit printed separately and might be paged for the High Court only at the foot. It would then be a comparatively simple matter for the agents of the parties in England to arrange and re-index the documents in an intelligible order, and to omit all irrelevant matter. As long as the record is prepared in India the legal advisers of the parties will seldom take the responsibility of omitting documents, as they say

(and not without reason) that they cannot tell what counsel in England may or may not consider material, but if it were laid upon the agents in London to keep out from the record all irrelevant matter, no such difficulty would occur, as counsel would be ready at hand for consultation, and if there was any real dispute about particular documents the matter could be taken before the Registrar of the Privy Council

It is possible that the charges of the London agents for this work would be slightly higher than if the final preparation of the record were allowed to be done (as at present) in India. But this ought not to be allowed to weigh against the manifest advantage of the present proposal. It must also be remembered that the change will necessarily produce a great reduction in the cost of a Privy Council appeal, as the printing charges which will be saved, amount in some cases to several hundred pounds. It is also a matter of common knowledge that the fees marked to counsel in England usually bear some rough proportion to the size of the record, and if this can be materially reduced, there should be at least some corresponding reduction in counsels' fees.

I am myself satisfied that unless some radical change of this sort is introduced, no real reduction of the time which now elapses between the decision of an appeal court in India and the case being ready for hearing in the Privy Council, can be effected. It is all very well to say that we must look to the High Courts to keep a tighter hand upon the parties in India, but the High Courts will rarely do so. Judges are after all human, and may not be particularly anxious to have their judgments reviewed in the Privy Council, where the atmosphere is quite different, and local conditions are not always understood, and the result is that they take very little interest in cases which are pending there, and seldom have any desire to expedite them. It is, moreover, to the interest of the Indian practitioner that the matter should drag on as long as possible. There are more applications, possibly, to be made, more opportunities for advising and consultation; more chances of "something turning up"; and in many cases more chances of a settlement out of court.

I do not of course deny that there may be difficulties in effecting the change I would suggest, and it may be that it will not be possible in all cases to utilise the actual High Court print for the preparation of the Privy Council record. For instance, it is, I understand, not the practice in the Bombay High Court to print the whole record in appeals from the mofussil though in Calcutta they apparently do so (see the Calcutta appeal book in the file). I suggest, however, that the rules of all the High Courts should provide for the printing of proper appeal books in every case in which there *may be*

an appeal to the Privy Council. Where the pleaders on both sides in order to avoid the cost of printing agree that there is no likelihood of a further appeal and sign a formal certificate to this effect, the rule might be relaxed. I do not suggest that their having done so should be a bar to a subsequent appeal if the case were otherwise a fit one to be taken to the Privy Council; and in such a case the record would no doubt have to be specially printed. It might not be unreasonable, however, to provide that in all such cases the record must be printed in England, and that any additional costs thereby incurred should be borne in any event by the appealing party. With some such provision as this of a quasi-penal nature the cases would be probably few and far between.

It may also be suggested that in some cases translations are allowed to be used in the High Court in appeals from the mofussil which are not "official". This, I know, is or used to be the case in Bombay, where translations made by pleaders were frequently read. I doubt, however, if this is really an objection of any weight. In all such cases if the particular translation were objected to by the other side it would either be corrected by the Judges, or an official translation would be required before the case could be decided, but if no objection were taken, the translation used would serve equally well in the Privy Council. All that would be required would be a rule that any unofficial translation used in the High Courts should, unless objected to in that court, be deemed to be a proper translation in the Privy Council. This might be without prejudice to any application to the Privy Council (*i.e.*, to the Registrar) to allow a fresh translation to be made in a special case at the cost of the party applying for it, and would not of course preclude the Judicial Committee themselves from calling for a better translation where they thought it material. But here again the cases in which such a question might arise would be rare, and their Lordships, or the Registrar, would no doubt allow only a strictly limited time for production of a corrected version.

Another possible objection might be to the additional expense entailed by the printing of the extra "Privy Council copies" of the appeal book in cases where there might be in fact no further appeal. But this again, I think, would not be a consideration of much weight. The Calcutta High Court Rules require a minimum of 30 copies of the appeal book to be printed (Belchambers, page 29 *vi*), and the Privy Council Rules require 40 copies to be lodged

*This exception might also be applied to other appeals in which it may be desired to save the expense of printing the additional copies requisite for use in the Privy Council, see paragraph 12.

(page 9, rule 13) This would make a total of 70 copies to be printed. I have ascertained that the cost in India of printing 30 copies

The sample appeal book estimated of an ordinary appeal book for actually contained 221 pages. of 200 pages would be about Rs. 640, while that of printing 70 copies would be only Rs 662. The difference therefore is almost negligible, and it may be that on examination of the actual requirements of the two courts, the total number of copies can be reduced to nearer 50.†

There would no doubt also be objections from the class whose special business it is now to prepare the Privy Council records in India, and particularly in Calcutta; but this I think may be disregarded.

The proposal which I have ventured to put forward above is no doubt revolutionary, and will want careful consideration and perhaps some elaboration in working out. But it does at all events cut at the root of the present scandal, and I am convinced, as I have already said, that nothing short of a radical reform of this nature will be of the slightest use. It will also be noticed that almost all cases of delay after the High Court record has gone home will be directly within the cognisance of the Privy Council, and their Lordships will be able themselves to deal with any cause of complaint. Practically the only questions for the Indian Courts will be in the case of revival proceedings, and these, if the period before trial in the Privy Council is materially shortened, will of course be much fewer.

There may at all events be some advantage in putting forward a concrete proposal of this nature for the consideration of the High Courts, and if they object to it (as they probably will do) it will be up to them to devise something better. Of course if they like to bestir themselves they can do a good deal to remedy the delays of which the Privy Council complain, even under existing circumstances; but though much the same complaints have been made for the last 20 years (see Safford and Wheeler, Privy Council Practice, 1901 edition, page 802) the scandal is certainly as great as ever still.

I wish to add that if the proposals made in paragraphs 5—15 above are not acceptable to the High Courts, the only remedy in my opinion will be for the Privy Council to withdraw the privilege

†If this small additional cost in all cases were thought to be material, it might be met by the suggestion in paragraph 10, or the cost could easily be provided for out of the great saving to parties who *do* appeal to the Privy Council by reason of the record not having to be printed *de novo*. If a stamp fee of say Rs. 30 per hundred pages of the appeal book, with a maximum of Rs. 250, were charged on the transmission of the record in every Privy Council appeal, the fund thus accumulated would be ample to provide for the cost of printing the extra copies in cases where no appeal was made.

at present accorded to litigants of printing the record in India, and to insist on the whole appeal record, whether originally printed or not, which was used before the High Court, being sent home with the addition only of the judgments, and to enforce the preparation of the Privy Council record there. The charges for printing and preparation in England might be higher than in India, but the rigid exclusion of unnecessary papers, which would be under the control of the authorities there, would counterbalance the additional cost in many cases. This alternative, however, though it would have the merit of requiring only a change in the Privy Council rules, would not obviate the necessity which at present exists in most cases of printing the material parts of the record twice over, and would thus lack the advantage which is inherent in my first suggestion, of not only reducing the delay, but also the cost of appeals to His Majesty in Council.

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No. 31.

QUESTION OF THE LIABILITY TO ENHANCED DUTY OF
DUTY-PAID OIL IN A LICENSED TANK AT THE
TIME OF ENHANCEMENT OF THE TARIFF RATE.

(29th August, 1916)

THE position seems to be that though the oil continued to be stored, after the duty was paid, in what was treated by arrangement between the parties as a licensed warehouse, the Customs authorities gave up all control over it to the importers, which would seem to be equivalent to waiving their rights over the oil under the license, at all events so far as concerned Chapter XI of the Sea Customs Act. The importers no doubt could have surrendered their license, and if this had been done the oil would, I think, clearly have ceased to be "warehoused under the Act" (section 37). But they did not do so, and the tank continued to be, as much as it ever was, a licensed warehouse. The importers, having presumably applied for and accepted a license for the tank as a warehouse under the Act, would, I think, be precluded from denying that this was the effect of the arrangement, though it is not strictly within the scheme of the Act. It might, however, be contended that after the Customs control over the oil had been removed the storage could not longer be considered to be a warehousing "under the Act," but I think myself that if it was so originally, the keeping of the goods in the same warehouse after the duty had been paid must be treated as a continuance of the original warehousing, and that the fact that the warehouse continued to be held under the license left the oil, as it was before, "warehoused under the Act". If I am right in this, section 37 will, I think, apply. The words of the section are very precise and make the goods liable to the enhanced duty until "*actual* removal", and I do not think that by any straining of language the handing over of the key of the tank of the importers can be said to be equivalent to *actual* removal.

So far, therefore, I think that the view taken by the Commerce and Industry is correct, but the importers may, nevertheless, have equitable claims to exemption from the enhanced duty. The handing over of control of the tank to them clearly allowed them to utilise the tank for any storage purposes, and if they have in fact put into it other undutiable oil with the result that the contents have become a mixed commodity, it would clearly be inequitable to

charge them duty on the total contents ; and I think the only fair course to adopt would be to remit the enhanced duty on the whole. If, however, there is no reason to believe that the importers have in fact added other oil, there can, in my opinion, be no reason for the exemption. The mere fact that they *might* have done so would clearly raise no equity in their favour.

I have no doubt that the practice of the Customs authorities should be changed at once and the control over the licensed warehouse retained till the *actual* removal of the contents. It will also be for their consideration whether their practice with regard to these oil tanks is really within the scheme of Chapter XI of the Act at all,

No. 32,

INTERPRETATION OF SECTION 98 OF THE INDIAN LUNACY ACT, 1912.

(1st September, 1916.)

I do not think that section 98 of our Lunacy Act helps us in this case, as under this section we can only act under the order or warrant of a competent court. If however, we receive an order from His Majesty under section 2 (2) of the English Act 1883 (46 and 47 Vict, chapter 38) directing us to detain the lunatic in question in an Indian asylum, I think that we should have to obey it. Personally, however, I have great doubts as to whether the latter Act would justify such an order and I think that the Secretary of State might be asked to satisfy himself on this point before agreeing to the Home Office's proposal. I suggest that the draft telegram should be modified to meet the views of this Department.

Home Department Proceedings
Medical A., March 1920, Nos. 121—132
(Legislative Department unofficial
No. 612 of 1916.)

No. 33.

JURISDICTION OF THE COURTS OUTSIDE BRITISH INDIA TO COMMIT PRISONERS TO BRITISH INDIAN JAILS.

(4th September, 1916)

I do not agree with the Bombay Legal Remembrancer. I think
 Home Department Proceedings that the word "Court," in section 3 of the Prisoners Act, Political B, October 1916, Nos 202—203.

(Legislative Department unofficial No. 607 of 1916) 1900, only refers to British Indian Courts. This is the sense in which all expressions are used in our Acts, unless there is some definite indication that a wider application is intended. Compare, for instance, Section 15 (1) (a) and Section 18 (1). If the word "Court" in Section 3 only refers to British Indian Courts, I cannot see how its meaning can be extended by an Order in Council authorizing Courts outside British India to commit prisoners to British Indian jails. An order in Council might conceivably give an independent authority to officers in charge of Indian jails to receive such prisoners, but if such an order was made we should probably have to amend our Act in order to comply with it.

I think that the Iraq Courts are probably acting under the general authority of His Majesty within the meaning of Section 15 (1) (a), and that therefore officers in charge of prisons outside the Presidency towns can give effect to the warrants of the Iraq courts, and transfers can no doubt be made to the Presidency town jails under Section 29 (2), but nothing short of an amendment of the Act can authorise officers in charge of Presidency town jails to receive prisoners direct under Iraq Court warrants. I do not know the reason for the restriction of Section 15 (1) (a) to the case of jails outside the Presidency town, and it may be that there would be no objection to an amendment of the Act. This will be for the Home Department to consider.

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No. 34.

INTERPRETATION OF, AND POWER TO WIND UP, HOSTILE FIRM.

(11th September, 1916.)

THE Question dealt with in paragraph 3 of the Deputy Secretary's note is undoubtedly a difficult one, and I was at first inclined to agree with his view but on further consideration I think that it is the *person* under this act who is the hostile firm and not the business—in short, that “*once a hostile firm always a hostile firm*”. In this view of the sub-section Mr Low is right in saying that the taint follows the person, and in my opinion the wording of section 2 (c) is wide enough to include under the expression “hostile firm” a person now carrying on an innocent business but who had previously been engaged in carrying of a business of the character aimed at by it. If, therefore, Hans Blascheck after the outbreak of the war carried on the business of a Blascheck and Co, and that business was carried on “wholly or mainly for the benefit of hostile foreigners,” I think that the present business of H. Blascheck & Co, however innocent in itself can be wound up under the Act. This is no doubt a somewhat drastic interpretation of the enactment, and might, as Deputy Secretary notes, hit an innocent British subject but I have no doubt that in such a case the provision would not be enforced. If, however, the narrower interpretation were adopted, it is obvious that one of the main purposes of the Act would be defeated. It was clearly before our minds when drafting the original Ordinance that we should have to deal with the case of Germans, naturalised as British subjects, but with continuing German sympathies, and I think that so far at all events as the present case goes, it is sufficiently covered by the sub-section.

The firms of Reif, Goll and Banker would seem to stand on a somewhat different footing. The business previously carried on by Reif as a Partner in Bume and Reif was according to Mr. Low's note not mainly with Germany, and therefore the particular taint did not attach to him when he started his new business. Goll is dead and there can be no question of any personal taint. Banker is a Parsi and British subject, and, though if I am right the sub-section would apply to him, it would probably be impolitic to wind up his present business if in itself innocent.

With regard to the draft notification referred to in paragraph 5 of Deputy Secretary's note, there may be a question whether under rule 1 of the winding up order, a *part* of the proceedings can be transferred to a local Government. It would, I think, be safer first to amend rule 4 by inserting between the words "all" and "proceedings" the words "or any part of the" and after the later words "such proceedings" the words "or any part thereof". This could be done by the notification, and the draft in question would then be in order.

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No. 35.

DECISION TO REGARD THE SIKKIMESE SUBJECTS AS
BRITISH SUBJECTS FOR THE PURPOSES OF THE
TREATIES AND TRADE REGULATIONS RELATING
TO TIBET.*(25th September, 1916)*

I AGREE. Since we do not allow Native States to enter into independent relations with any Foreign Powers, I think that it is reasonable to infer that in any Treaties we may make we are acting on their behalf as well as on behalf of technical "British subjects". I would, therefore, read the expression "British subject" in the Thibet Trade Regulations of 20th April 1908, as including subjects of Native States which, though not part of the British Empire, are under our protection. This is only in accordance with what I understand to have been our regular policy in according "consular protection" to the subjects of Native States. The question whether the particular persons concerned are subjects of Sikkim State would ordinarily fall to be decided by law of that State, but in the absence of any definite law on the subject, I think that we should be quite justified in dealing with Thibet, in claiming that the matter should be decided on the same principles as we have adopted for ourselves. The question is not one for legal decision but for diplomatic insistence, and all that is necessary is that our claim should not be an unreasonable one. When once the parties concerned are handed over to us as "British subjects" within the meaning of the treaty, it is of course a question between us and Sikkim whether they should be tried by us or by a Sikkim Court, and though there may have been no formal cession of jurisdiction to us by that State, we should no doubt insist that we have the necessary jurisdiction by "usage" or "sufferance".

MC42LD

No. 36.

CONSTRUCTION OF SECTION 180 (2) (d) OF THE ARMY ACT.

(25th September, 1916)

I THINK that the legal position is correctly stated by Secretary. If section 180 (2) (d) (Legislative Department unofficial No. 674 of 1916) of the Army Act were merely intended to give a remedy, supplementary to that under section 42 it would, I think, have been so expressed. In the absence of any such words as "without prejudice to the provisions of section 42", the similarity of the wording adopted in the first three or four lines of the two sections, certainly suggests that section 180 (2) (d) was intended to be a modification of section 42.

There is, however, as Secretary points out, nothing in section 180 (2) (d) to make the decision of the Governor General final, and His Majesty would undoubtedly have the right to review it.

I would point out that under section 180 (2) (d) it is for the Viceroy to decide and not the Governor General *in Council*.
MC42LD

No. 37.

CESSION OF JURISDICTION OVER PORTIONS OF THE
NORTH-WESTERN RAILWAY IN THE BHALA AND
NABHA STATES AND OVER THE RAJPUTANA-MALWA
RAILWAY IN THE NABHA STATE.

(7th October, 1916.)

I AGREE that a formal cession in writing is essential in such a case, and that it would be very unsafe to rely merely on previous practice. I don't think that the letter of 31st July 1875 from the then Chief, of which a copy is in the file, is a cession of jurisdiction at all, though every one seems to have treated it as such, nor does the admission of the present Chief make it a cession. Even if it could be so regarded, the terms are so indefinite that it would be very unsafe to rely upon its efficacy. With regard to the North-Western Railway lands there never has been a cession at all, and it is at least doubtful whether any practice under which the British Government has in fact exercised jurisdiction would be sufficient to support the right if called in question in the courts.

Foreign and Political Department
Proceedings Deposit I., (Secret), February 1917, Nos 17-18
(Legislative Department unofficial No. 657 of 1916.)
Confidential No. 496
General B, January 1876, Nos. 24—31.
Internal B, May 1913, Nos. 64—68, notes page 6.

No. 38.

(I—II)

CONVEYANCE THROUGH BRITISH TERRITORY OF
PRISONER ARRESTED UNDER FRENCH AUTHORITY.

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I.

(8th October, 1916.)

I do not think that the conveyance of a prisoner arrested in Balasore under French authority through British India to Chandernagore either by British or French authorities is legal under the existing law, and I have no doubt that it would be unwise to attempt legislation on the subject at present. The illegality of doing this might have various results (1) the escape or rescue of the prisoner would not be an offence under our law, (2) Habeas Corpus proceedings might be instituted in the Calcutta High Court or (3) the prisoner might have a civil action against his custodian for unlawful detention. Neither (1) nor (2) would perhaps be of great practical importance. If the prisoner was ordered to be brought up and released by the High Court, he could if "wanted" by our police for an offence in British India be immediately re-arrested and would then be subject to our courts without the necessity for extradition (3) might be awkward. It could be got over, as Secretary suggests, by the French authorities sending their own officer to take charge of the prisoner in Balasore. Any action for unlawful detention would then have to be brought against the French authorities and probably in Chandernagore and they might safely be left to deal with this. In fact, it is very unlikely that such an action would lie at all under the French law. If the French authorities will agree to this, it would certainly be the best course to adopt. Otherwise I think that we must take the risks attendant upon the conveyance of prisoners by our own officers from Balasore to Chandernagore. There is at all events some probability of these privileges being surrendered to us altogether by the French after the war. If not we shall have then to legislate to validate the transfer through British territory.

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II.

(27th October, 1916.)

THE difficulty we have to face is the fact that the moment a man, arrested under French authority in Balasore, steps over

the frontier into British India his custody by our officers is illegal, and will so remain till he steps over the frontier again into Chandernagore. Supposing Sir James DuBoulay's suggestion above were adopted, it would at the most legalize the man's detention in a Mufussil jail in British India, but the difficulty of getting him into Chandernagore would still be unmet. If the French were willing to allow us to take over the man and try him ourselves the moment he crossed the French frontier into British India, there would be no difficulty, but I understand that so far as the present proposed arrangement is concerned, they insist on his being tried by their own authorities in Chandernagore. If the provisions of section 15 (2) (a) of the Prisoners Act, 1900, would be of any real assistance, I should be inclined to adopt the suggestion as at least a "*tabula in naufragis*". If the case came up before the courts we might, I think, fairly argue that the words "Court or tribunal" in the sub-section covered a French Court acting under special authority from our Government, and though the argument might not be accepted, it would at all events give a colour of legality to our procedure. I am not, however, without hopes, having regard to the Secretary of State's telegram on which I noted yesterday that the French authorities may now be willing to accede to some more workable arrangement.

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No. 39.

TURKISH "NOTES" IN MESOPOTAMIA AFTER BRITISH
OCCUPATION.

(23rd October, 1916)

I FEEL very little doubt that Secretary is right. A Turkish "note" is, I presume, in the ordinary form of a promise by the Turkish Government to pay, and their being "legal tender" before we occupied the country only meant that the Turkish Government made it obligatory upon all persons in that country to accept their promissory notes in discharge of debts. The whole basis of "legal tender" is the hypothesis that any holder can take the note to the treasury of the maker and demand payment, and if the maker, the Turkish Government, has been forcibly dispossessed and is no longer there to pay, the obligation to accept its promise rests upon nothing, and almost necessarily falls with the fall of the Government that imposed it. The principle is in fact very near the maxim *cessante ratone, cessat ipsa lex*. It seems to me to be clear therefore that the incoming power is entitled to absolve the persons over whom it has assumed forcible control from the obligation previously imposed upon them.

The occupying power may, but is not bound to, fulfil the promises of the enemy, and if the fulfilment of them would advantage the enemy it would be absurd to expect it to do so. In the case of Belgium no doubt the invaders thought that the balance of convenience to themselves was in favour of maintaining the currency of the local bank's notes, of which possibly they may have seized or acquired a considerable stock, or they may have desired to continue the issue themselves. But such considerations may well have no application in Mesopotamia where any considerable influx of Turkish notes from Arab sources might enable the Turks, in effect, to draw the sinews of war from us.

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No. 40.

APPEALS AGAINST ACQUITTALS

(24th October, 1916)

I SAY frankly that I have personally a great dislike to the appeal against an acquittal, as it is contrary to one of the fundamental principles of justice recognised in nearly every civilised country. But I do recognise that such appeals are in some form and in some cases necessary in this country. I would, however, only allow them in exceptional cases and on definitely distinct lines from the ordinary appeal against a conviction. It is no doubt very convenient for a local Government to be able to appeal in any case where what seems to them an important question of law is involved which they would like to submit to better argument and to a higher tribunal ; and I believe that a considerable amount of the opposition to the present proposals is founded on the administrative importance attached to this aspect of the case. I find myself, however, altogether unable to subscribe to this view. In a doubtful case, where an accused person has been acquitted in a fair trial by an honest judgment of a judicial officer appointed by Government, I think that he is entitled to the full benefit of such acquittal

My objection to the present practice is also based upon a belief that many such appeals are now directed in cases where they are not justifiable in any view, and I think that it would be very helpful if all local Governments were asked for a return of appeals filed under section 417 of the Criminal Procedure Code during the last five years. The Calcutta High Court tell us that they have had on an average 8 appeals a year during the last 10 years of which an average of five have been successful. This after all is only just over half, but I should, even in this case, prefer to see the figures for each of the last 5 years, as a ten years' average may be misleading. None of the local Governments have given us any figures at all and I think that they might quite possibly be instructive. Since I have been out here, I have noticed in the papers reports of several such appeals which have been unsuccessful and in which, so far as I could judge from the newspaper reports, no appeal ought to have been allowed.

I am not particularly in love with the words "clearly wrong" which seem to have excited so much adverse criticism, but I hold strongly to my original opinion that there ought only

to be an appeal against an acquittal in a case where there has been what is often called a "miscarriage of justice", and it was only because these words were thought to be open to possible misinterpretation that the India Office Committee adopted what was thought to be plainer English. It may be difficult to define in the abstract what "clearly wrong" means, but no law officer or judge dealing with a concrete decision would have any difficulty in saying whether or not it was in his opinion clearly wrong or not. What is intended is that the thing primarily to be considered is not so much the guilt of the accused, as the "guilt" of the judgment appealed against. Unless it can be said that in the particular case no reasonable man could have come to the conclusion that the accused was not guilty, or possibly in other words, unless the judgment was "perverse" the acquittal in my opinion ought to stand. There are many cases where a judge may well say "I do not agree with this conclusion myself, but at the same time I am not prepared to affirm that it is clearly wrong." Unless the law officer can affirm this in the first place there ought not in my opinion to be an appeal, and unless the appeal judges can affirm it, the acquittal should stand. If any better form of words can be devised to express this intention I for one should be quite ready to accept it.

If my meaning is still not clear it may be elucidated by a reference to the discussions in the Court of Appeal and the House of Lords in the *Metropolitan Railway versus Wright*, 11 A. C. 152. The principle I would contend for was definitely adopted in many earlier cases in India of which it will be sufficient to refer to *Emperor versus Gaya'din*, 1 L. R., 4 All., 148, and *Emperor versus Robinson*, 1 L. R. 16 All., page 214. But it has been departed from in more recent decisions, see in particular *Emperor versus Bhimbhuti*, 1 L. R., 17 Cal., 485, and *Emperor versus Prag Dat*, 20 All., 459. For convenience of reference I append to this note extracts from the Indian decisions to which I have referred.

With regard to the specific proposal that the Advocate General's opinion should be made a condition precedent to an appeal being filed under section 417, I only want local Governments to be bound to act on the best legal opinion open to them before directing an appeal, and this I assume to be the opinion of their Advocate General, or if there is no Advocate General their senior law officer. If he is not qualified to advise them on such a point, I cannot conceive who is. The fact that in small provinces there may be no law officer at all raises to my mind no greater difficulty than the Bombay Government's objection that if this addition were imposed they might have to increase their Advocate General's

remuneration ! Cases under section 417 *ought* not to be frequent, and when they do occur, provinces with no law officer may well be accorded assistance from a neighbouring province. Provided, however, that the principle is made clear that the Courts are only to reverse an acquittal in the case of a real miscarriage of justice, I should be quite content to accept the suggestion that the law officer's certificate need only be that the case was a fit one for appeal under the section, if these words are thought to be preferable.

With regard to the substantive provision defining the conditions under which alone a judgment of acquittal may be set aside, I should be willing, as I have already stated, to accept any form of words which will make the intention perfectly clear. That the object of the amendment has been generally misunderstood seems to me to be plain. I agree that if all that is intended is that the accused is to be given the benefit of any reasonable doubt no special form of words is required, as this general maxim applicable to all criminal proceedings is, of course well accepted in the courts. But if the intention is as I conceive it to be, that the principle to be applied to appeals under section 417 is to be an essentially stricter one than this, and that an appeal is only to be allowed in a case of what I have called a real miscarriage of justice, or where the judgment of acquittal was "perverse," I am convinced that very clear and definite words are required to impress this principle upon the Courts.

MC42LD

No. 41.

KALAMBANDI RIGHTS IN THE BARODA STATE AND IN
THE REWA KANTHA.

(24th October 1916.)

Under the *Kalambandi* the Gaekwar seems to have been entitled to levy in the case of adoption whatever fee was customary, the *Kalambandi* recognising, as I read the document, the Gaekwar's suzerain rights in the Rewa Kantha. It seems clear, however, that the British Government subsequently refused to recognise these rights as appertaining to the Baroda State, and informed the Gaekwar in * 1899 that the whole administrative control of the Rewa Kantha must be considered as vested in the British Government. But having regard to the provisions of Article 5, Clause 11 of the *Kalambandi* they† promised that they would credit to the Baroda Government any *nazarana* levied by themselves the right to fix and levy it being specifically stated to be reserved to the British Government. It seems idle to speak of this action as merely interpreting the *Kalambandi*. It was in effect an act of state, superseding it, and taking to ourselves the suzerain rights which the *Kalambandi* recognised as vested in the Gaekwar, and so far as the promise to credit to the Baroda Government any *nazarana* we might thereafter levy went, it was not an affirmation of the existence of the agreement under the *Kalambandi*, but a new promise of a different kind by ourselves, not being in any sense of a contractual nature, but really by way of concession. Having assumed to ourselves as the paramount power the former suzerain rights of the Gaekwar, we proceeded to remit succession *nazarana*, at all events in many cases, without consulting his Government; (I doubt if the ‡proclamation of 1911 which speaks of "Indian Princes" and "States" strictly applies to "Mewassee Zemin-dars" in Rewa Kantha); and the power to do this is clearly within the rights which we had assumed.

Foreign and Political Department
Proceedings Internal A, December
1916, Nos 6—9.

*Cf Internal A., April 1899, Nos
154—158

†Cf Internal A, April 1899, Nos
154—158.

‡See Appendix II to notes in Internal
A, February 1912, Nos 40—45.

Under the above circumstances I should have thought that the most obvious answer to make to the present claim was the one based on the wider grounds that as paramount power we had decided not to enforce payment of *nazarana* at all, and that therefore there was no hing which the Baroda Government could now

claim But it is equally clear that if (for reasons which I do not myself comprehend) it is desired to treat the *Kalambandi* as in some way still representing our relations with Baroda *qua* the Rewa Kantha, their claim is unsustainable whether it be based strictly upon Article 5 (11) or on the so-called interpretation of

**Cf* Internal A., April 1899, Nos 154—158. this clause adopted in *1899. No adoption has been made or

is intended to be made, and there is no succession of an adopted son There is, it is true, also no succession of an heir, which is the only alternative contemplated by the *Kalambandi*, but that is again because we having assumed paramount rights over the Mandwa Chiefship have decided in virtue of such rights to nominate a third party as successor in the place of the rightful heir.

Which of the two positions should be adopted in the reply to be given to the Baroda Government is purely a question of policy. To my mind the provisions of the *Kalambandi* are and have been, at least since 1899, a dead letter, and it may lead to complications hereafter if the present decision is based on a recognition of it as still in force. But whatever view may be taken of this politically, it seems clear that the claim of the Baroda Government has no valid basis upon any of the documents in the case

No. 42.

QUESTION WHETHER THE FINDARA JAGIRS IN CENTRAL INDIA ARE BRITISH OR GWALIOR TERRITORY.

(26th October, 1916)

Foreign and Political Department I agree generally with
 Proceedings I, December 1916, the above notes in this De-
 Nos 8—9.

(Legislative Department unofficial partment.
 No 732 of 1916).

The intention in 1831 was I think to make over the whole of Shujalpur Pargana to Gwalior. There is no hint anywhere in the papers of that date that any villages included in it were to be excepted from the cession. The only question discussed was as to the revenue value of the Pargana which to be compensated for by the territory which Gwalior was to give in exchange. It was also decided shortly before the actual exchange was effected that the Findara Jagir was to be continued to the family of Rajun Khan, and this Jagir was therefore excluded from the valuation. Its being so excluded was quite consistent with its forming part of the ceded Pargana on the assumption that it was to be continued to Rajun Khan's family, and would therefore bring in no revenue.

In my opinion all the contemporary documents support this conclusion. Mr Welleley's

In Foreign Department Records letter of 5th November
 Political consultations, 23rd Decem- 1831 evidently assumes that
 ber 1831, Nos. 32—34. this was the intention, as in re-

commending the continuance of the Jagir to Rajun Khan's family he suggests that the concurrence of the Gwalior authorities should be obtained, and notes that in the event of the villages being resumed (evidently by Scindia) additional exchange territory would have to be given to the British. He could not have contemplated a resumption by Scindia at all, if the intention was that the villages in question were not to be ceded at all. Then in

†*Ibid.*

reply† to this letter Mr. Prinsep, Secretary to the Governor-General, is clearly of the same opinion. He does not suggest that the villages are not to be included in the cession of the pargana, but are to remain in British hands, though he refers to their exclusion from the valuation, and continues "the British Government will in his Lordship's opinion be entitled to expect that the claims of the family (of Rajun Khan) to retain possession

(of the Jagir) will be respected by Scindia's officers." Lower down the letter speaks of "the desire of the British Government that the family should be left in the unmolested possession of the villages," and requests that this may be communicated (to Scindia). No one can read this letter (which was not of course written to express the views of some officer who did not know the details of the proposed arrangement for exchange of territory, but emanated from the Governor-General himself) without coming to a clear conclusion that at this time at all events the intention was that the Jagir villages were to be included in the exchange and would therefore come under Scindia's suzerainty, but that the British authorities were determined to see that he respected the jagir rights of Rajun Khan's family.

The actual cession was made in September 1832 *i.e.*, about 10 months after the Secretary's letter was written, and there is nothing whatever to suggest that any change was made in the arrangement in the interval which would exclude these villages from the cession.

There was further correspondence between the Government officers in which Major Foreign Department Records — Political Consultations, 13th August 1832, Nos 37—43. Alves raised the question of the necessity of a sanad and, if so, for what period.

In dealing with this question he expressed the opinion that it would not be necessary to procure the sanction of the Durbar—a point which could not possibly have arisen if the villages had not been included in the cession which was then a *fait accompli*—and speaks of the Pindara family's peculiar position as pensioners of the Company "within a district now belonging to Scindia" This clearly implies that the villages in question were now part of Gwalior territory, and the point is made clearer still by Mr Robinson's letter which follows in the

Ibid. file and speaks of "this Pindara family as Pensioners of the Company *in a foreign jurisdiction*." How they could possibly be referred to in these terms if their villages were still part of British India, I am altogether unable to comprehend. It is true no doubt that the family were still to consider themselves as pensioners of the Company, and as a side note to the last paper* in this

**Ibid.* file points it "the family should at the same time be given clearly to understand that their tenure depends upon the pleasure of the

British Government," but this meant no more than that the British Government would only protect them against aggression by their new suzerain as long as they were of good behaviour.

Then in 1837 we have a clear statement in a despatch from the Directors that the Jagir was included in the cession and that Rajun Khan's family were entitled to British protection against "Arbitrary measures of resumption" by Scindia's Government which makes it clear that at that time the jagir villages were considered to be part of Gwalior territory, and under Gwalior suzerainty

I also gather from the papers that the jagir villages have been consistently treated until at all events very recent times as part of Gwalior territory and under their jurisdiction.

The only document which in any sense supports the opposite view is Mr Trevelyan's letter Foreign Department Records — Political Despatches dated the 1st of the 1st May 1834 in answer to Mr. Cavendish. But I

do not think that there is anything in this letter which is really inconsistent with the fact of full territorial cession subject to the insistence of the British Government that the rights of the jagirdar should be respected by Scindia as long as the British Government chose to insist upon it. So in

**Ibid.* paragraph 2 the letter* in question speaks of the exclusion of the villages from the valuation having been intended "to obviate any plea for their resumption by Scindia", but if they had not been included in the cession but left as part of British India it is obvious that there would have been no room for such plea and no precautions were necessary to anticipate it. If, however, the villages were included in the territorial cession, but it was intended nevertheless to insist on Scindia respecting the rights which the British Government had conferred on the Jagirdar, it was reasonable enough to charge Gwalior nothing (so to speak) for this part of the ceded territory, so as to have an answer ready if that State made any attempt to resume the villages. So too in

Ibid. paragraph 3 the letter speaks of the Jagir being "under British protection," a hopelessly inappropriate expression if what was really meant was that it was still part of British India and had now been ceded to Gwalior, and that therefore Scindia had no right over it at all. The position was no doubt an anomalous one in that while the territory, and with it the ordinary rights of suzerainty

had been ceded to a Native State the British Government intended to see that the rights of the Jagirdar were properly respected by the new suzerain and this to my mind was the state of affairs with which the letter was intended to deal. The reference to a "final transfer" of the villages towards the end of the letter was perhaps hardly appropriate but at the same time it seems to imply that there had already been a qualified transfer, though according to

Ibid

the view which Mr. Bosanquet favours there had been no

transfer of any sort, the jagir villages have been altogether excluded from the cession.

Having regard to the above considerations if I am asked how far the documents support the contention that the Jagir villages are British and not Gwalior territory, I would say unhesitatingly that in my opinion they do not support it at all, but on the contrary point to an exactly opposite conclusion.

No. 43.

NECESSITY OF PREVIOUS SANCTION OF THE GOVERNOR-GENERAL TO THE MADRAS HINDU LIMITED OWNERS BILL.

(27th October, 1916.)

Having regard to the settled practice of this Department
 A, January 1917, Nos. 10—17. I think that we must hold
 that sanction is required This
 is the second case recently in which a local Government has decided
 for itself that sanction is not necessary and has allowed a Bill
 to be introduced which we have
 afterwards had to tell them
 The Bill has not actually been introduced, but leave to introduce has
 been given. G R. L[OWNDES].
 required sanction. I think that we ought to insist on all local
 Governments asking us, before a motion for leave to introduce is
 allowed, to be put in their Council, whether sanction is necessary
 or not. We must maintain —

- (1) that this is a question for the Government of India to decide, and
- (2) that the words "take into consideration" in section 79 (3) of the Government of India Act include a motion for leave to introduce.

This question has been dealt with at some length in the file referring to the alteration which we suggested in the Madras Regulations, and the question is of considerable importance

It is much to be regretted in this particular case that the Bill was allowed to be introduced without referring the question of sanction to the Government of India, as it is by no means clear that sanction ought to be granted

The Bill presents many difficulties of which the two that stand out most clearly are —

- (a) whether we ought to allow a Provincial Government to deal with any branch of the Law which is of Indian application except to meet purely local requirements, and
- (b) whether, in any case, we ought to sanction provincial legislation to modify the general Hindu Law.

As to (a), I agree with Secretary that this practice, of which we have had more than one other recent instance, is very undesirable. The Hindu Law is no doubt subject to variation in different parts of India, but the differences are not really provincial, as there is no true *lex loci* among Hindus in India. It is often said loosely that the Madras Law is different for instance, to the Bengal

Law, but what is really meant is that communities belonging mainly to Madras have adopted customs which differ from those of the Bengalees. But if a Bengali governed by the Dyabhaga settles in Madras, he will not thereby be subject to the so-called Madras law, but will still be presumptively governed by the Dyabhaga. He in effect carries his personal law with him and the Courts of his adopted province adjudge his rights *qua* Hindu by this and not by the system generally prevailing in the province where he may even be permanently domiciled. A Bill, however, of the nature of that now before the Madras Council would prescribe in a particular branch of Hindu Law conditions which will be binding on all Hindus resident in the province irrespective of their origin and would govern all immoveable property, at all events, there situated, irrespective of the custom of the community to which the owner belonged. The nature of a Hindu widow's estate is practically the same all over India, and if the Bill is a good one for Madras, it is *prima facie* a good one for all India and should be considered if at all in the Imperial and not the Provincial Council. It will, in my opinion, be a great mistake if we allow local variants of all India laws to any greater extent than is absolutely necessary to meet specific local conditions. If this is sound in principle—and I believe it has already been recognised as so by the Government of India,* it would seem to

*See this Department's Despatch No. 2 of 1911, dated the 11th May 1911.

Unofficial No 206—304 of 1911

as the evils which the Bill proposes to remedy are not in any sense peculiar to Madras but are experienced equally in that case of all Hindus all over India.

With regard to (b), the question is whether the Bill does involve a departure from the General Hindu Law. It is stated definitely in the Statement of Objects and Reasons that it does not, but it is pretty generally recognised in the preliminary comments which have been sent up with the bill that in fact it does, and this seems to be made clear at the outset by the application section (clause 2) which is worded "Notwithstanding any rule of Hindu Law to the contrary." There can, I think, be no doubt also that section 3 the principal section of the Bill which would allow a widow to transfer immoveable property merely on the ground that the transfer would be beneficial to the estate, is to this extent an absolute innovation, and the principle which seems to be involved that only the immediate presumptive reversioner is concerned in such a transaction is, to my mind, entirely opposed to the prevailing doctrine. The Bill is in fact, as one of the authorities consulted says, really an attempt to codify a bit of the Hindu Law, and if this is to be done at all, it should be done for all India, and not for

Madras alone, and then only if there was a really general consensus of Hindu opinion in favour of the proposals. The last attempt of Madras in this direction was hardly encouraging. Their Gains of Learning Bill was undoubtedly an earnest and courageous attempt to settle a difficult and important question of Hindu Law, and one that might well have commended itself to a progressive community, but no sooner was it passed in the local Council than a storm of adverse Hindu comment was elicited, and the Governor was compelled to refuse his sanction. There seems to me to be every prospect of a similar result in the present case if the Bill were fortunate enough to get through the Council. There is a large body of very conservative Hindu opinion in the country which will not brook any innovation on their sacred Hindu law, and I feel very little doubt that it will sooner or later make itself heard in condemnation of such a Bill as this. In the recent case of the Hon'ble Mr. Setalvad's Bill in our own Council, its smooth passage was probably due to the distinctly adroit contention of the mover that it was only re-instating the old Hindu law which had been set aside by an incompetent Privy Council.

Even, however, if the Bill were shorn of its more clearly unorthodox innovations and remained merely as a proposal to allow the immediate validation by the Courts of a proper alienation by a widow, I think that the principle of the Bill is essentially unsound. The reversioner to take the estate on the widow's death is a person who cannot be ascertained at all until that event takes place and is frequently unborn at the date when the alienation is necessitated. To allow his interests to be represented on the sanction proceedings by the then "presumptive" reversioner is not only unfair to him, but will often be a direct inducement to defrauding him. A Hindu widow is of course frequently a very young woman entirely under the influence of her own relatives who have no interest in either the spiritual welfare of her husband, or in the person who will ultimately be responsible for his well-being in the next world—and it must be remembered that this is the basis of the descent of all immoveable property in the Hindu law, the right to the property and the obligation to perform the necessary ceremonies always going hand in hand. At the time of the husband's death, the presumptive reversioner is often another childless brother of the deceased who can hardly have the remotest chance of surviving the widow or taking the property. An arrangement is then made between him and the widow's male relatives for the sale of the property. A complaisant purchaser is procured, fictitious debts are set up, and the Court having only the persons before it sanctions a sale. The simple result of it is that the widow or her relatives, the presumptive reversioner and the purchaser, share the proceeds

between them. The only possible check on such transactions, which are even now of every-day occurrence, is the knowledge that some unborn person may be able to attack them on the widow's death. This makes it difficult to get a purchaser who will come in except upon being assured of the greater part of the swag and without him it is obvious that nothing can be done. No doubt, this reacts on the widow's chances of selling in a genuine case of necessity, but this seems to be almost inevitable, though in a really *bona fide* case it is generally possible to get all the expectant reversioners to join in the transfer and particulars of the "necessity" can be plainly recited in the document. In such a case it is not, I believe generally difficult to find a purchaser who will either buy or advance the required money or mortgage at a reasonable rate and such transactions, though frequently attacked after the widow's death, are in nine cases out of ten upheld by the Courts.

I regret to have felt constrained to note at such length upon an apparently trivial matter, but I cannot help feeling that real questions of principle are involved, and for the reasons I have stated above, I should be in favour of refusing sanction to the Bill though it embodies proposals which are at first sight decidedly attractive.

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No. 44.

JUDGMENT OF MR JUSTICE CHAUDHURI, CALCUTTA
HIGH COURT, IN THE MATTER OF ARREST UNDER
SECTION 54 OF THE CRIMINAL PROCEDURE CODE
AND THE NECESSITY OF AMENDING THE SECTION.

(27th October 1916)

I have discussed this question with Secretary and agree generally with his note, but the case is a curious one and not very conclusive as to general principles.

Home Department Proceedings
Police A, February 1917, Nos 15-16.
(Legislative Department unofficial
No 766 of 1916.)

In the first place it appears from the newspaper report that the case was argued entirely upon section 54 (1), and that no reference was made to section 56 which, as Secretary points out, has a considerable bearing upon the meaning of section 54. One would have thought that under section 54 it would have been sufficient to prove that in fact one or other of the conditions laid down in section 54 (1) "first" did exist in *Karwar*, but no attempt seems to have been made to do this, possibly because of section 56, though nothing was said about this section.

In the next place I doubt if sufficient was made of the difference in wording between "reasonable" and "credible," but here again it may have been that the Police Commissioner's affidavit did not state definitely that he considered the information he had received to be "credible." I gather that this must have been so from the last half paragraph of the judgment. It seems that he might well have said under the circumstances that he considered the letter which he had received from the Deputy Superintendent of Police countersigned by the Magistrate, to be credible and that he acted upon it. If he had sworn to this, it would have been at least more difficult for the Judge to have held the arrest to be unlawful. But the report does not set out the contents of the letter, and without knowing what was in it I cannot say whether this suggestion is sound. I do not, however, regard the judgment as conclusive that a Police officer in the position of the Commissioner of Police may not act upon information which he considers to be credible solely because of the credibility of his information and I doubt if Chaudhuri J. meant to lay this down as a matter of law. It might, however, be as well to let us see the papers again when fuller information is available. In this case it would be desirable to get a copy of the Deputy Superintendent of Police's letter and of the Commissioner's affidavit.

It is certainly curious that the question as to the meaning of words "credible information" has never come up for discussion be-

fore seeing that the practice impugned is a general one. I have no doubt that it is necessary that a Police officer should have power to arrest on telegraphic instructions, and that he should be entitled to rely solely on the authority of the officer from whom these instructions emanate, and as a doubt has been raised on the point it may be as well to clear it up in the Amending Bill now under consideration in which I am proposing to add at the end of section 54 (i) first the following words.—

“ or for whose arrest a requisition has been received from a Police officer who might lawfully have made the arrest himself.”

It is noticeable that in the corresponding provisions as to searches a very similar provision to this finds a place in section 166 of the Code.

I should add that in the particular case which has given rise to this discussion there would appear to have been no reason why the Magistrate at Karwar should not have issued a warrant.

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No. 45.

ACQUISITION OF A NEW SURNAME BY ADVERTISEMENT.

(30th October, 1916.)

Probably the strict legal conception is that a surname is acquired by inheritance and that a new surname can only be acquired by grant from the Crown, by act of Parliament, or by common repute. A Deed Poll or advertisement are only a first step towards the acquisition by repute and have in themselves no legal validity, but are regarded as important from the point of view of establishing the identity of the person. I always understood that the Crown refused to recognize a change of name except by its own license or by act of Parliament (which necessarily carried the Crown assent) but the Government of India seems to have already in some cases recognized a mere change by Deed Poll or advertisement, and there seems to be no reason to adopt the stricter view out here.

The present case is one of a guardian (whether legally appointed or not we do not know) laying a foundation for "repute" in the case of a minor, and I have considerable doubts as to whether this is within the scope of his authority unless at all events it is clearly for the benefit of the minor. The boy in question however is a cadet and therefore presumably of the years of discretion and if he desires the change to be made I see no harm in acceding to the request, but I think it should be done rather on the authority of the minor than that of the guardian. Personally I can see no reason why the advertisement in this case should not have been published by the minor.

No. 46.

(I—II.)

DEALING WITH OBJECTIONABLE UNIVERSITY DIPLOMAS
UNDER SECTION 19 OF THE SEA CUSTOMS ACT, 1878.

I.

(3rd November, 1916.)

I agree too, but I think that it should be borne in mind that the Home Department Proceedings “emergency” which has been Medical Deposit, June 1918, No 12. declared and which alone justifies the interception and (Legislative Department unofficial No. 777 of 1916) detention of postal articles was (Confidential File No. 535) clearly the existence of a state of war, and that any detention of postal articles beyond the period absolutely necessary to allow of a clear censorship is contrary at least to the spirit of the section. However objectionable these diplomas may be they clearly have nothing to do with the existing emergency. I don’t know whether there is any rule in existence under section 18 (1) which would justify the return of these diplomas to the senders but it might, I think, be possible to deal with them under this section.

II.

(22nd March 1917.)

Section 19 of the Sea Customs Act has been resorted to for such a variety of purposes evidently having nothing to do with Customs, that the present proposal may well pass. At the same time I do think that it is not altogether clear that a University diploma, however evil, comes within the expression “goods” as used in a Customs Act. The Policy of the Post Office Act seems to be clear, that though you may prohibit the transmission by post of any articles [section 21 (2) (a)] you may only open and search the very limited class of postal articles enumerated in section 23 (2), the powers as to other postal articles being only to open and examine in the presence of the addressee (section 24). To so use section 19 of the Sea Customs Act and section 25 of the Post Office Act as to practically get rid of the distinction above referred to, is certainly pressing the application of section 19 of the Sea Customs Act to the farthest limit, though I am not prepared to say that it would be illegal.

What really seems to be wanted is a further amendment of section 21 of the Post Office Act. The Act of 1912 gave power to prohibit the transmission by post of any articles but gave no power to search for them, and it is really this lacuna that seems to want to be supplied.

With reference to section 18 (c) of the Post Office Act, it may not be desirable to apply this sub-section to articles posted outside India, but there seems to me to be nothing in the section itself to restrict its application.

No. 47.

JURISDICTION OF BRITISH COURTS OVER CARGO OF A
FOREIGN STATE TEMPORARILY LANDED IN BRITISH
TERRITORY.*(15th November, 1916.)*

(Legislative Department unofficial
No 816 of 1916, includes also 832)

I have discussed this case
with Secretary and agree generally
with his conclusions.

There is, I think, good authority for the proposition that the public property of a foreign State, though in British territory, is not subject to our municipal Law, and I think that this doctrine would be applicable just as much to cargo temporarily landed from a ship which is the property of the foreign State, as to cargo on board such ship, provided that it is being used for national and not merely for trading purposes.

I also think that our courts would not have jurisdiction to enquire into the title of the foreign State, provided that the property was formally claimed by it as its own. It would, in my opinion, be no concern of our courts to enquire whether the cargo had been properly condemned by a prize Court or not.

Under these circumstances, if ships which have been seized by the Portuguese Government from an enemy Power, are brought into Bombay for necessary repairs, and the cargo which was seized on them is landed in Bombay for the convenience of such repairs only, the Bombay Courts would in my opinion, have no power to order the detention or disposal of such cargo if certified to be the property of the Portuguese Government

We, cannot, of course, guarantee that the courts will not interfere; we can only say that in our opinion they ought not to do so, and I think that we might fairly promise that if they do interfere we will legislate. If the proposed action is taken at once, we ought to be in a position before the end of our next session in Delhi to know if legislation will be required or not, I do not think that it would be a case for an Ordinance.

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No. 48.

PERSIAN GOVERNMENT'S CLAIM FOR A REFUND OF THE
BUSHIRE CUSTOMS AND POSTAL RECEIPTS COLLECTED
DURING THE BRITISH OCCUPATION OF THE
PORT.

* * * * *

(22nd November, 1916.)

The question put to us by the Foreign and Political Department
(Foreign and Political Department is not strictly a legal one and is
Diary No. 1018-W. of 1916.) not covered by international
law. Occupation of territory
of another state except as an act of war, or for the enforcement of
some term in a treaty of peace, is hardly known to jurisprudence.
It is essentially an assertion by a stronger power of its strength;
if the weaker Power is unable to resist and no other power takes
the matter up, it would seem to be for the occupying Power to
dictate its own terms.

The reference to Article 48 of the Hague Convention, which
deals with the occupation by a belligerent of enemy territory,
is no doubt analogous in many respects, but it naturally says nothing
about the disposal of surplus revenues, which like other property
of an enemy state would clearly be at the absolute disposal of the
occupying Power. So far, then, as we are asked to say what are
the legal rights of the Persian Government to the surplus revenues
collected in Bushire, neither Article 48 of the Convention nor the
precepts of international law are of any assistance.

The question to my mind is clearly one of general equity and
political expediency, and we should do what seems to us to be
just and politic. We have taken the law into our own hands,
and as the stronger Power it is for us to decide what will we do. If
we had been at war with Persia we should no doubt have exacted
an indemnity from her to cover at all events some part of the cost
of our operations and the injury caused to our own subjects and
dependants, and thus we should be equally entitled to do as the price
of our withdrawal from an occupation which was not an occupation

of ' enemy territory ' only because Persia was either unable or unwilling to resist. The position was in effect a state of war :

" Si rixa est cum tu pulsas ego vapulo tantum ". So far as we hold in our own hands surplus revenues collected in Bushire, we are obviously entitled to hold them as against any claim we may have to an indemnity, and it seems to me to be purely a matter of grace how much we should exact on this account from the Persian Government, and how we should apply the monies that we hold.

I have suggested some alterations in the draft telegram in blue pencil.

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No. 49.

MADRAS CHILDREN BILL.

(25th November 1916)

With regard to the particular proposal before the Government of India I need not note at length as it has been fully dealt with. I agree that if legislation is necessary it should be all-India legislation and not local, and I think that we must tell Madras so and refuse sanction to the introduction of their Bill

Home Department Proceedings
 Jails, June 1917, Nos 19-20.
 (Legislative Department unofficial
 No. 798 of 1916).

With regard to the larger question of an imperial Act, I am also satisfied that we ought to take the matter up and that local Governments should be addressed on the subject.

As to what form this should eventually take it may be premature to say much, except that it will probably be better if possible to improve existing Acts rather than to legislate *de novo*.

Probably the most controversial subject would be that of the girls. From the figures given by the Madras letter, it appears that in the years referred to very many fewer girls were brought before the courts than boys. Their letter does not state specifically whether the figures given relate to Madras only or to all-India, but assuming that they relate to the Madras Presidency only, then in 1913 only about 1 in 60,000 and in 1914 only about 1 in 80,000 of the population were brought before the courts. In the case of convictions no separate figures are given for girls. The figures, however, are not very serious in any case

It appears to me that at least two of the effective proposals of the Madras Government might be easily carried out by amendments of the Criminal Procedure Code, *viz.*, to make parents, or actual custodians, liable to pay the fines imposed on youthful offenders and to provide for special childrens' courts.

The Reformatory Schools Act of 1897, might well be improved so as to provide for industrial, as well as strictly reformatory schools and, if it were thought necessary, to provide separate schools of each sort for girls. "Certified Schools" could also equally well be provided for under this Act. These schools ought to be sufficient to deal with the ordinary cases where an offence has been committed, and if they were used more freely, cases of imprisonment of young persons would be infrequent. If childrens' courts were established they probably would be so used.

Then in addition to the existing reformatory schools, I gather that there are certain Borstal institutions to which juveniles can be sent if their cases are dealt with under section 401 of the Criminal Procedure Code. It is suggested at page 2 of the notes that these cannot be used in the case of short term prisoners. But I do not quite understand this objection, as under section 401 a sentence can be suspended or remitted upon any conditions Government may choose to impose, and the period of detention in the institution need bear no relation to the period of imprisonment. I note, however, that under the section as it stands, the conditions have to be accepted by the person sentenced, and this might cause some difficulty in the case of juveniles. It might, however, be possible by an addition to the section to provide that, in the case of persons under 16, such conditions might be imposed as Government considers to be for the benefit of the person concerned, and that they should be deemed to have been accepted by him. I don't know what the existing practice is but it would seem to be desirable that in such cases the sentence should only be suspended at first, though it might eventually be remitted after discharge from the institution.

There remains the question of "rescue" cases, but the only real difficulty with regard to them is one of policy. If it is decided to deal also with this aspect of the Madras proposals, there is no reason why these cases should not also be dealt with under the amended Reformatory Schools Act by a special section on much the same lines as the existing Section 8.

Whether it would be necessary or not, in addition to legislation of this character, to enact specifically that no juvenile under a particular age should even be sentenced to imprisonment, might require consideration, but the Madras proposals seem to recognize that there might be exceptional cases in which imprisonment would be desirable. However, if every case in which a sentence of imprisonment was inflicted or would have to be enforced were reported at once (and this could easily be arranged for if the system of childrens' courts were adopted) Government could probably deal effectually with such cases under section 401 (see paragraph 7 above).

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No. 50.**THE CENTRAL INDIA EXCISE LAW 1916.***(30th November 1916)*

I quite agree that the provisions of clause 16 will not do. There is nothing to suggest even (Legislative Department unofficial that the collective possession No 828 of 1916.) is to be in one place, though this was probably intended. But as the clause stands it seems at least possible that every man in the Indore Residency Bazaars who possessed half a tola of smoking opium would be liable to a years' imprisonment provided you could find two other men in Mhow or Nimach who had more than half a tola between them! I quite admit that this is not the real objection to the clause but it illustrates the danger of talking about "collective" possession.

But even if the collective possession could be confined to one time and place—and there would be great difficulty in defining "place" for such a purpose—it is to my mind an impossible principle that the innocent act of one man should be capable of being automatically converted into an offence punishable with a year's imprisonment by the equally innocent act of another or of two other men. If I am sitting in my own room innocently smoking my half tola of opium, and my friend comes in and joins me and does the same, so far we are both law-abiding citizens doing only what the law specifically allow us to do. But if some third party, whom I have no desire at all to see, comes into the room and has twenty grains of the smoking mixture in his pocket, of which neither I nor my friend have any knowledge at all, we suddenly become criminals and may have to spend a year in jail. The position only seems to me to require stating to point its own refutation as a suggested principle of penal legislation.

The question of joint possession if it were proposed to substitute "jointly" in the clause for "collectively", would no doubt be a difficult one. If A and B jointly possess even $\frac{3}{4}$ tola of opium each would, I think, be liable under the first part of clause 16 (1). For in the case of joint possession each is, I think, legally in possession of the whole, and if I am right in this it would be a mistake to specifically penalize joint possession of quantities exceeding one tola. "Possession" is no doubt a difficult word to define, but the essence of it, I think, is physical dominion and intention to appropriate.

I notice that in clause 31 (1) "liable to" should be "punishable with".

No. 51.

EXTRADITION TREATIES WITH NATIVE STATES AND PROSECUTION AND CONVICTION OF EXTRADITED PERSONS FOR SEPARATE OFFENCES.

(12th December, 1916)

(Legislative Department unofficial, No. 667 of 1916) In the case of an extradited person two quite distinct questions may arise, namely:—

(I) Can he be prosecuted for an offence entirely different (*i e*, based upon a different set of facts) from that for which he was extradited? and

(II) If prosecuted for the offence for which he was extradited (*i e*, upon the same set of facts) can he be convicted of a different offence?

(I) can clearly be controlled by the executive. (II) equally clearly cannot under our existing law, in the case of persons extradited from Native States (II) is of importance where we have agreed with a Native State that only certain offences shall be extraditable, as in the case of our conventions with (for instance) the Rajputana States and with Nepal. For if tried for the extradition offence, the court would undoubtedly have power at that trial under the Criminal Procedure Code to convict him on the same facts of a minor offence which might not be extraditable under the convention. This could only be prevented by an amendment of the Code, and I doubt if the Foreign and Political Department are prepared to recommend this. The executive, however, would still be able to give general effect to their agreement with the extraditing state by a remission of the sentence under section 401, or in a very special case by recommending His Excellency to grant pardon. In the case of Baroda, however, with which the Bombay reference is primarily concerned, no question would arise under (II) as there is no limitation of the extraditable offences.

Paragraph 6 of the Bombay* letter of 17th December 1915

*I. A., July 1916, Nos. 34—36 deals only with question (I)

They say "The Government of Bombay would advise that it should be clearly laid down that a person extradited cannot be tried for an offence (committed prior to extradition) which is not disclosed by the facts embodied in the *prima facie* case by which the extradition was secured." Paragraph 2 of the Government of India's reply to this letter, dated 1st June 1916 also deals only with this question and not with question (II). The words "cannot be tried by a British court"

(slip E, page 5, last line) are no doubt inexact, and should be read as "cannot be prosecuted before a British Court"

It is probably recognized that the whole position as regards extradition treaties with Native States is anomalous. The policy of both Home and Indian legislation till recently has been to treat subjects of Native States as foreigners and aliens, see the Foreign Jurisdiction Order in Council 1902, and the British Nationality and Status of Aliens Act, 1914. If this was the real position, it would no doubt be correct to have "extradition" arrangements with them. But the modern idea is to treat them as individually integral parts of the empire, and on this view an arrangement on the lines of the Fugitive Offenders Act, 1881, would be the appropriate policy. It is because we have unfortunately adopted the extradition line, and at the same time are not willing to concede all that extradition implies, that these difficulties are so constantly arising. It will no doubt be very hard to get out of this rut, as Native States are keenly jealous of anything that appears to touch their shadowy but much prized "independence", but if in time they can be welded together as a definite entity in the Empire, they may be induced to exchange the present unsatisfactory extradition for the procedure which has been applied to the colonial possessions.

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No. 52.

RAISING OF THE STATUS OF THE JUDICIAL COMMISSIONER'S COURT IN THE CENTRAL PROVINCES.

(22nd December, 1916)

I have no hesitation in agreeing with my Hon'ble Colleague Sir Reginald Craddock. I consider that every thing points to the desirability of raising the status of the existing Judicial Commissioner's Court in the Central

Home Department Proceedings
Judicial July 1917, Nos 134-135
(Legislative Department unofficial
No 899 of 1916).

Provinces The Province is a large and prosperous one, its population seems to be about 14 million. Of the other provinces having only Judicial Commissioners, Sind, and the North-West Frontier Province are both probably under 4 million, though Oudh is about 13 million, Burma, on the other hand, which has a Chief Court, is about 12 million, and the Punjab, which is now to be a High Court, is 19 million, roughly the same population as that of Bombay. Commercially and industrially, the Central Provinces has progressed enormously in recent years, and it certainly cannot be classed at the present time as in any sense one of the backward provinces. The volume and complexity of the court work has increased steadily and now necessitates the services of four Additional Judicial Commissioners, and a regular judicial service has been established in the province.

It seems obvious to me, therefore, that the elementary stage of evolution is clearly past, and the next and natural step in development is overdue. It is absurd that the courts of such a province should not be entrusted with jurisdiction over European British subjects, and it is, to my mind, altogether derogatory of its status, that this should have to be divided between the Bombay and Allahabad High Courts.

The elevation of the Judicial Commissioner's to a Chief Court would, if carried out on the ordinary conditions, in itself assist in making the judicial service of the province more attractive and therefore more efficient, and would only be a reasonable concession to legitimate ambitions. It would also tend in some degree to the greater independence of the court, which is a matter of no little political importance in these days.

Many of the administrative changes which are admittedly desirable could no doubt be effected by legislation without raising the status of the court, but to do this would, I think, be a mistake as the time has, in my opinion, clearly come for the greater constitutional change.

I am also entirely against the change of status without the corresponding increase of emoluments. If the additional cost is a real objection, I would leave matters as they are until the further expenditure can be afforded. To set up a Chief Court, the Judges of which were not to be given the pay accepted as proper for other Chief Courts, would be a distinct slur upon them, and so far from satisfying the natural ambitions of the service, it would only accentuate any feelings of discontent that may now exist. It certainly would not render judicial service in the province more attractive or make for increased efficiency. I do not think, however, that the increased cost of the change ought to be in any way decisive, as it seems clear that the rising court fee revenue of the province can well stand the extra charges involved.

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No. 53.

(I—II.)

QUESTION WHETHER LAND REVENUE IS RENT OR TAX
AND THE NECESSITY OF PREVIOUS SANCTION OF
THE GOVERNOR GENERAL TO THE CENTRAL PRO-
VINCES LAND REVENUE BILL.

I.

(20th January, 1917.)

THIS case raises a very big question and one in which I should have expected that the Revenue Department would have a good deal to say. It has always been a debatable question whether land revenue as imposed under the British rule is a tax or a rent, the fundamental question generally being whether, in theory at all events, the Crown is to be regarded as the original owner of all land in India or whether the ownership is and has always been in the individual subject to the payment of a tax to the State. The modern tendency is probably to revert to the idea of State ownership, and it may possibly be of importance some day to be able to assert this principle. There must be much Indian literature on the subject which should be within the cognisance of the Revenue and Agriculture Department, but with which I am not acquainted, and it may be that some definite policy has been laid down on the point in the past. For instance, I find that Sir John Strachey in the course of his Financial Statement for 1877-78, which introduced the Northern India License Bill (one of the precursors of the present Income-Tax Act), stated as follows :—

“There is no greater, though no commoner, mistake than to suppose that, because the land in India yields two-fifths of the entire Revenues of the State, the part of the community that derives its support from agriculture contributes an unfairly large proportion of the public burdens. The ordinary misconceptions on this point arise from forgetfulness of the fact that the greater part of our land revenue is not taxation, but rent paid to the State as proprietor of the land.....”

and this pronouncement does not seem to have been questioned by any one.

It is obviously impossible to treat such a subject exhaustively in a departmental note, nor have I the materials for doing so, but my own view has always been that land revenue is for the most part essentially a tax, and in my opinion any proposals for legislation in a local Council which would affect it are within the purview of section 79(3) (a) of the Government of India Act, 1915.

If the general intention of the section is considered, land revenue would seem to be almost necessarily within its purview. It is, I presume, by far the most important source of the State's income, and it seems inconceivable that it should have been intended that a local Government should be allowed, without sanction, to legislate to affect it, though it could not do so in the case of any of the less important sources of revenue. No doubt, under existing arrangements a large proportion of the land revenue goes into the provincial Government's purse, but this can hardly affect the question, and the words of the section are taken from the Councils Act of 1861, which was in force before provincial contracts were first introduced.

Historically there seems to me to be little doubt that the origin of our existing land revenue system was, speaking generally, not the relation of landlord and tenant, but of State and subject, and that it represented share in the produce of land which was taken by the State for State purposes, which seems to me to make it essentially a tax. The old Hindu tax, from Manu onwards, recognise clearly the right of the King to a share, varying from 1-12th to a fourth in the produce of the land, the right to exact as much as a fourth being apparently limited to times of war, invasion or great public adversity, which emphasizes the object of the exaction. When the Muhammadans came, they also exacted tribute from the land known as '*Khiraj*' (Cf. '*Lakhray*' holdings, *i.e.*, revenue-free), which was limited to a half of the actual product, though it is usually said that Akbar reduced this limit in India to a third. The East India Company, when it came in, professed to base its claim to land revenue on the ancient custom (see the preamble to Regulation XIX of 1793, referred to by Deputy Secretary, and also Regulation XXXVII of the same year), and the existing system is of course only a continuation of the Company's practice (see paragraph 5 of Lord Curzon's Land Revenue Resolution of 16th January, 1902).

A, February 1902, Nos. 23-24 F-50

There are, I believe, various records of the last century dealing with the question, *e.g.*, Mountstuart Elphinstone's Report of 25th

*I have not been able to get any of these but extracts from them will be found in the Kanara Land case Bom. H. C. R. Appendix page 1, which is the *locus classicus* on the subject.

October 1819* Revenue Selections, Volume 4), a Minute of Sir Thomas Munro of 1822, Sir Archibald Galloway's work on the Land and Constitution of India (1825*) etc., which refer specifically to land revenue as *land tax*, and it is frequently spoken of under this denomination even in more modern discussions, see for instance paragraph 1 of the Bombay Memorandum printed in Chapter VII of "Land Revenue Policy" (1902). The common term '*Jama*' is also explained in Wilson's Glossary as

"the total amount of rent or revenue .. including . . . *land tax*", and the first meaning given by the same authority to the Muhammadan term '*Khuraq*' is also '*tax*'.

The fact that all income from land which pays land revenue is specifically exempted from income-tax under Act II of 1886 also supports this theory that land revenue is at least in part a tax, at all events as including the fair share of the land's contribution to the expenses of Government.

On the whole, therefore, there seems to be quite enough to support the argument that land-revenue is a tax within the meaning of section 79 (3) (a) of the Government of India Act, and there can, I think, be no doubt that it is "imposed by the authority of the Governor General in Council". None of the local Acts purport to impose the tax, but only to provide for its particular assessment and collection, the liability to it being either merely recited or assumed

For the above reasons I am of opinion that the proposed amendments to the Central Provinces Land Revenue Bill can be ruled out as requiring the previous sanction of the Governor General, but at the same time I think that the Revenue and Agriculture Department should consider whether they wish to commit themselves definitely to the view that land revenue is a tax, with all the consequences that this may entail.

II.

(6th June, 1917.)

I THINK that this question is one of such importance that any researches Revenue and Agriculture Department can make which will throw light on it are well worth making, probably they will refer to the Kanara case which I cited in my previous note.

It is quite possible that the true theory is that land revenue is a combination of rent and tax as being in theory the largest share of the production that the occupier or cultivator can afford to pay to the State. A rack-rent in the sense of the highest competitive rent which the landlord can charge, would of course be fixed with reference to the general scale of taxation, but if the State found it necessary to impose further taxation, the tenant could not demand exemption on the ground that his rent was too high to admit of his paying the additional tax. Here in India, however, even under the stress of war conditions, it is considered impossible to put any war tax whatever upon the land, on the ground apparently that it would be regarded as a breach of faith.

Assuming that the true theory is that land revenue is made up of rent and tax, the difficulty no doubt arises to a great extent from the fact that the State is the recipient of both, and that it is jointly assessed. In principle the two should be separated, the rent being what the occupier could fairly afford to pay for the chance of being able to make a profit out of the land, and the tax being such a proportion of the profit actually made as the State required for the public necessity. It is therefore this joint theory of rent and tax which is the difficulty. India's resources are so largely agricultural that it seems almost absurd that when war taxation is necessary agriculture should wholly escape. It is to a certain extent true that the present war only affects India indirectly, but the next emergency may be one in which India is a principal and the same difficulties will crop up in a more acute form.

It does seem to me that we must get away from the idea that extra taxation on land for general State purposes is taboo, and it would be at least helpful in this direction if it were possible to arrive at the conclusion that land revenue is in reality rent. I fear, however, that the opposite conclusion is more likely to emerge from any examination of the older records.

With reference to the Hon'ble Mr. Mant's suggestion at the end of paragraph 2 of his note of 14th February 1917 (page 4) I doubt if the question can be considered purely one of law. It is rather a question of mixed law and fact, and it is certainly material to ascertain how experts have regarded it from time to time. It must, however, I think, be remembered that such an expression as "land tax" may have been used loosely in any discussion to which the question of tax and rent was not material.

MC42LD

No. 54,

(I—II.)

APPEAL AGAINST CONVICTION OF PARSHOTAM RAI
ZALA OF JUNAGADH STATE.

I.

(13th March, 1917.)

I REGRET the delay in dealing with these papers, but in the first place it has been a very busy time with me, and in the second place, finding myself, as I do, entirely opposed to the action of the Bombay officers concerned, I was anxious to go into the matter very fully before venturing to express my opinion.

Foreign and Political Department
Notes regarding Parshotam Rai Zala's
case.

I think I should state at the outset that I had the opportunity of discussing the case at length with Mr. Laurence Robertson, the Secretary to the Bombay Government, and one of the officers personally concerned in the decision under appeal, when he was in Delhi recently, and that Sir P. D. Pattani has also spoken to me about the matter as it was one which he had had to deal with when he was a member of the Bombay Executive Council and in which he took considerable interest. I should add that I myself, when I was at the Bar advised, along with practically all the leading counsel in India, on the purely legal aspect of the proceedings in 1906, and I quite recognize that this fact may have unconsciously biased my present judgment. I have, however, so far as I know, never even seen the petitioner, and had nothing but a purely professional interest in the case. Mr. Laurence Robertson was a very strenuous advocate of his own cause and I put all my own difficulties to him very fully, so that I am satisfied that I have heard all that there is to be said on the matter *against* the petitioner's appeal.

It will, I think, be desirable that I should set out as concisely as I can the salient facts of the case, as they are not altogether easy to collect from the papers.

Prior to 1903 the State of Junagadh was to all intents and purposes ruled by the Wazir, a more or less illiterate Mahomedan of great position and influence, the Nawab being undoubtedly a mere figure head with no real power or influence at all. Under the Wazir was the Naib-Diwan, Parshotam Rai Zala, who is the petitioner in this case. He was a Hindu whose forefathers had been in the State's service for several generations, and he was

probably to a great extent the Wazir's jackal. In 1903 he appears to have fallen into disfavour and retired from the State service, and in 1904 certain mam property which had been granted to him, nominally of course by the Nawab, but in reality no doubt by the Wazir, was confiscated summarily. With this act I have no concern. It may have been just, or it may have been unjust, but the hand that gave took away again, and this is in the ordinary course of events in a Native State. It is only with what happened later that I propose to deal in this case.

In July 1906 Mr Mirza Abbas Ali Baig, a statutory civilian of the British service, who had had a somewhat varied previous career, was lent to the Junagadh State as Diwan, and it is, I think, important to remember that he went there as a British official lent to the State. He was of course like the Nawab and the Wazir a Mahomedan, and it is clear that from the outset he determined finally to eradicate the influence of the *ex-Naib-Diwan* Zala. Reading between the lines of later events it seems fairly clear that he made a defensive alliance with the Wazir, which he worked for his own purposes. His reign in Junagadh was notorious as I think the Bombay Political Department must know, though his subsequent career has, of course been a distinguished one, but when he left for England shortly before the Nawab's death, the very general impression was that he would shortly return to Junagadh where his influence was very great. It was probably only after the Nawab's death that the part he had played in the State became generally known, and I cannot avoid the suspicion that Zala has been sacrificed largely, though no doubt sub-consciously, to avoid the exposure of Mr. Baig. The gross injustice that has, in my deliberate opinion, been done to him is to be traced directly to Mr. Baig who almost certainly knew at the time the real facts of the case (see paragraph 7 below). His influence in Junagadh is still a very powerful one, and when the young Nawab gets his full powers, it is more than likely that Mr. Baig will again aspire to be the Chief Adviser of the State, an event which I for one should greatly deplore.

To continue my narration of the facts — Within a few weeks of taking over the reins Mr Baig decided to prosecute Zala for peculation of State funds 14 years before. That there was nothing very definite against him in more recent times is clear from the selection of so stale a charge, nor have the intimate enquiries which have been going on for the last 6 years, apparently, disclosed anything which would have justified his prosecution for any other offence. A special commission on the lines of Act XXXVII of 1850 (with one important variation, which will be noticed directly) was constituted for the trial, and Zala who was then living in British territory was

notified to appear before it in person. This for obvious reasons he declined to do unless his personal freedom was guaranteed, and his request to be allowed to appear by counsel was refused. Under section 11 of the British Act referred to above, the person accused is allowed "to appear to answer the charge either personally or by counsel," but this important safeguard was deliberately omitted from the corresponding clause 8 of the order appointing the commission. Formal charges were framed against him by the commissioners of having misappropriated the sum of Rs. 1,53,000 of State moneys in 1892, and a written representation which he had already made to Mr. Baig was taken to be his defence. In it he said that this sum had been remitted by the Wazir through him to Bombay by means of hundies or native bills of exchange, that with it 153 currency notes of Rs. 1,000 each had been purchased, and that these notes had been sent back to Junagadh and made over to the Wazir; and this has been the petitioner's consistent account of the transaction from first to last. The commission after taking evidence came to the conclusion that the money was sent to Bombay by Zala "merely in order to throw dust in the Wazir Sahab's eyes": that it "was secretly brought back to Junagadh in the convenient shape of currency notes, and misappropriated by the accused" and that "it was certainly never returned or accounted for to the Wazir." The commissioners accordingly convicted Zala of misappropriation of the sum of Rs. 1,53,000 and reported accordingly. On the 21st October 1906 an order was issued under the signature of Mr. Baig purporting to be a Firman of the Nawab, accepting the finding of the commission, stating explicitly that it had been established that the money had never been returned to the Wazir, and in effect fining Zala Rs. 1,53,000+Rs. 25,000 (=Rs. 1,78,000 in all), and this sum was subsequently realised by the confiscation of all his remaining property in Junagadh, which he claims was worth considerably more.

It is material here to mention that the commissioners took the evidence of the Wazir by interrogatories in the course of his answers to which the Wazir specifically denied that the Rs. 1,53,000 was his money at all, and denied that it was returned to him in any shape. Commenting upon his deposition (which has now been proved to be false) Mr. Rendall says page 7 of his letter of 20th October 1916) "It is an open secret, as the files show that the State" (i.e., Mr. Baig) "did not wish to call the Wazir Bahauddin as a witness because they really knew or at any rate suspected strongly, what his share in the transaction was." It is also somewhat remarkable to find from the record of the commissions proceedings that the interrogatories for the Wazir's examination were sent by the commission to Mr. Baig, to be administered, and that the answers,

which bore neither the signature nor seal of the Wazir, were returned by Mr. Baig to the commission. These facts, taken in connection with various other indications of Mr. Baig's being behind the scenes throughout the course of the commission, appear to me to justify the statement I have made in paragraph 5 above that Mr. Baig must almost certainly have known the real facts at the time, and to show that the proceedings were collusive from the outset.

Zala was advised after the conclusion of these proceedings that if his defence was true, as he still maintained, the only way to clear himself was by tracing the thousand rupee notes, the numbers of which were all known, to the Wazir, as it was evident that if even one of them could be satisfactorily so traced the latter's statement upon which the finding of the commission was largely based, would be seriously discredited, and the truth of Zala's defence to that extent at all events established. Accordingly he put the matter in the hands of the Bombay Commissioner of Police, who with the help of the Paper Currency Office eventually traced a number of the notes indubitably to the Wazir by whom they had been paid away, and made out a very strong case with regard to certain others the correctness of which does not appear now to be disputed. The notes so traced amounted to 22 in all. Mr. Robertson in his confidential report says he was satisfied as to 11 of these, but there seems to me to be a very strong case as to 22. The actual number however is immaterial. Mr. Baig had been translated to the Secretary of State's Council in 1910, and the Nawab died in the following year. The heir was a minor and Mr. Rendall of the Indian Civil Service was appointed administrator of the State. He seems to have taken stern measures at once with the Wazir, and on bringing him to book actually found in his possession no less than 62*

*I am not sure whether it was actually 61 or 62. But the point is not very material.

G. R. [L.]

more of the identical thousand rupee notes, which were then made over to the State Treasury. One would have thought that the misappropriation, for which Zala had been convicted and ruined being thus emphatically brought home to the Wazir, or in any view of the case, his complicity in the crime having been established, and falsity of his deposition before the commission of 1906 demonstrated, like treatment would have been meted out to him. But the administrator apparently thought otherwise, and the Wazir was left in dignity and honour, though no doubt shorn of his power, until his death, while the conviction of Zala was, equally no doubt for State reasons, maintained.

On the tracing of some of the notes to the Wazir and the discovery of others in his actual possession becoming known, Zala not unnaturally applied for a review of the commission's finding

claiming, not without reason, that the facts which had now come to light had established the truth of his original defence, and thinking no doubt, that with the State under British administration, British ideas of justice would be allowed to prevail. His application came up to Mr. L. Robertson, the present Chief Secretary in Bombay then acting for Mr. Rendall, who treated the matter as a legal appeal, allowed Zala to appear before him by counsel, and after hearing him at length recorded a formal decision that "the review applied for cannot be allowed" but without assigning any reason.

Zala then appealed to the Government of Bombay who seem to have been from the first divided upon the merits of the case, and it has now come here in appeal from them with no recorded opinion from that Government who are admittedly divided two and two upon the main question.

The outstanding features of the case on this resumé of the facts are .—

- (1) that Zala's original defence to the charge has now been established beyond question so far as concerns 84 out of the 153 notes (i.e., 62 found in the Wazir's possession + 22),
- (2) that the 62 notes have been recovered from the Wazir and have gone back to the State Treasury, while practically the whole of his fortune has also now been surrendered to the State, and this may be taken to include the value of at least the other 22 notes which were traced to his possession;
- (3) that Zala has been made to pay to the State as part of the fine inflicted on and exacted from him the whole of the Rs. 62,000 which the State has now recovered in original from the Wazir, as well as the Rs. 22,000 traced to him as above;
- (4) that the principal evidence on which Zala was convicted, viz, the deposition of the Wazir, has now been proved to be wholly and deliberately false; and
- (5) that even under the extraordinary circumstances which I have narrated Zala's claim to have his conviction on the criminal charge set aside has been refused by a British administrator and no shred of restitution has been made to him.

If these facts represent the truth I have, for my own part, no hesitation in saying that a gross injustice has been done to him, and that it will be a blot upon the British administration in Native States if the Government of India declines to interfere.

That Zala was convicted in the first instance upon perjured evidence, in a trial that was the merest travesty of justice engineered (if that is not too strong an expression to use) by a British official on loan to the State, and held under colour of the authority of practically a dummy Nawab is beyond question. The facts of the case as to this so-called trial were submitted to the judgment of leading barristers all over India including such men as Sir S. P. Sinha, Mr. J. D. Inverarity and Mr. L. P. Pugh, who all independently arrived at the same conclusion, and even Mr. Robertson in conversation with me said of it "of course I admit that the trial in Junagadh was a mere farce"! I do not therefore propose to say any more upon this aspect of the case except to draw attention to the view put forward of the trial by Mr. Rendall, who apparently would hold it up as a model of justice (see paragraphs 4 and 6 of his letter of 20th October 1916). He lays great stress upon the status of the President of the commission "Mr. J. J. Gazdar, a Barrister of the Bombay High Court." He might have added that Mr. Gazdar had not been known at the Bar of the Bombay High Court for many years previously, and was at the time of the trial following the possibly more lucrative occupation of a soap-boiler! Mr. Rendall also waxes virtuously indignant over the unfortunate Zala's refusal to surrender and stand his trial in Junagadh, but surely anyone who knows anything about the administration of a Kathiawar State, and more particularly about the administration of Junagadh, would smile at this suggestion. If Zala had surrendered there would have been no trial, and no need for a trial. On the other hand if the case was an honest one, why were not the ordinary extradition proceedings adopted? The man was living in British jurisdiction, and would have been surrendered in the ordinary course if a *prima facie* case could have been made out against him—but the *prima facie* case would have had to be established in a British court, and none knew better than Mr. Baig that this could not be done.

The charge upon which Zala was convicted was that of misappropriating State money, but apart from the Wazir's evidence, which must now go out of consideration, there was not a shadow of proof that the money in fact belonged to the State. Zala's statement has always been that he received it direct from the Wazir and that so far as he knew it was the Wazir's money, which he returned to the Wazir. There is no doubt that the Wazir had accumulated a large fortune—now for the most part surrendered to the State from which no doubt it had come. But there was nothing improbable in Zala's belief that it was the Wazir's money and at the trial there was no evidence to show that there was any deficiency in the State funds. When Mr. Robertson took over charge the gravity of this defect in the evidence was appreciated,

and he instituted enquiries to see if the lacuna could not be filled in. It was only by these enquiries, made 6 years after the trial, that the supposed abstraction of Rs. 1,40,000 and the story of false *rukas*, referred to in paragraph 10 of Mr. Rendall's letter were brought to light, and Mr. Robertson told me that it was mainly on the basis of these discoveries that he refused to grant Zala a review of his conviction (paragraph 9 above). This however seems to me to be wholly unjustifiable. The "evidence" on which he acted, whatever it may have been worth, was not forthcoming at the trial before the commission, and had never been sifted in court, and I cannot think that any officer dealing with a case judicially, as Mr. Robertson was avowedly doing, could properly attach any weight to it. I have however personally the gravest doubts as to these "discoveries." The gentleman by whom they were made was a Mr. Bhaishanker,*

*The employment of Mr. Bhaishanker was not calculated to re-assure Zala, as he had previous to his engagement by the Administrator, been acting for Zala. How he came to go over to the other side is unexplained, but it was certainly unfortunate.

G. R. [L.] a very worthy ex-solicitor from Bombay whom Mr. Robertson employed to go through the old accounts. Now I have known Mr. Bhaishanker for 25 years. He has constantly been employed as an expert in Gujarathi accounts, but he has found more "mare's nests" in the course of his career than any other six members of his profession put together. I have suffered from his "discoveries" myself so frequently during my career at the Bar that nothing would induce me to put any faith whatever in another of them unless subjected to the most searching examination in court. The "forged *rukas*" (vouchers for payment) are on exactly the same footing, and are only "forged" on the supposition that the "mare's nest" contained real "eggs." In fact the deficit of the Rs. 1,40,000 depends largely upon the hypothesis that the "*rukas*" are forged. They however bear what is admittedly the genuine sign manual of the old Nawab Bahadur Khanji who died in 1892, as well as the State seal, and the theory is therefore that the old Nawab was fraudulently induced to sign vouchers for a sum of Rs. 1,40,000 which was abstracted some time prior to 1892, and that this was in reality the sum, or the greater portion of the sum, which was remitted to Bombay after his death and formed the subject of Zala's conviction. There are such obvious difficulties in this theory that I am altogether unable to understand how Mr. Robertson could have attached any weight at all to it.

Mr. Rendall's defence of his and Mr. Robertson's action is so extravagant in language that I need not deal with it at length. He

"protests too much." In view of the fact that at least three

*It is I think worthy of consideration that two successive Indian members of the Bombay Council, both of them men of wide experience in native state matters, should have taken a strong view as to the injustice of Zala's treatment and advocated interference on his behalf.

G. R. [L]

members of the Bombay Executive Council* have taken the opposite view, such expressions as, that "no person possessed of common sense" (paragraph 6) could believe that a gross injustice had been perpetrated that "it is mere lunacy to consider that the petitioner is an innocent victim": that "his guilt cannot possibly be doubted by an unbiassed person" (paragraph 11) that "no doubt can remain in the mind of any intelligent person that the petitioner has actually and intentionally been guilty of a treacherous fraud upon the State" (paragraph 12) etc, etc, are somewhat out of place. I may even venture to consider myself as possessed of a certain modicum of common sense and intelligence, and though I am unfortunate enough to be in disagreement with Mr Rendall, I certainly am not, I hope, a lunatic. The 9 rhetorical questions asked by Mr. Rendall in his paragraph 10 are all capable of intelligent answers if the case is looked at from a less biased point of view for instance, anyone familiar with the methods of book-keeping among native merchants in Bombay would know that what Mr. Rendall calls an anonymous and secret account was only an ordinary "Shah Khata" of everyday occurrence. But I need not enlarge the already unfortunate proportions of this note by dealing with these questions in detail.

There are however one or two other arguments in Mr. Rendall's apologia that I must deal with. He admits that roughly half the notes have been actually traced to the Wazir, and therefore were clearly not misappropriated by Zala, but he thinks that "this does not in *the least* affect Zala's guilt" (paragraph 18), meaning, as I assume from other parts of his letter, that as he has not been able to trace the remaining 71 notes to the Wazir, he must be presumed to have kept them himself. But in the first place this is surely a strange method of dealing with a criminal charge. On the defence made the charge must stand or fall with regard to all the 153 notes. The evidence was as to them all collectively, and the Wazir's statement on which Zala was convicted was a denial as to them all. If at any honest trial it had been proved that the evidence for the prosecution was wickedly false as to 82 out of 153 notes, could a conviction ever have been asked for in respect of the remaining 71? To this question only one answer could be given by anyone accustomed to deal with evidence. It is moreover at least material to remember that the Wazir admitted to Mr. Robertson, after the 62 notes had been found in his possession, that *the whole of the 153 had been returned to him by Zala* (paragraph 17 of

Mr. Robertson's confidential note), and though his original deposition on the records of the commission was hopelessly untrue, he had at least no inducement to say what was untrue to Mr. Robertson when everything was out. I do not find however that this fact is even referred to by Mr. Rendall.

But apart from the actual evidence in the case, was Zala's conduct consistent with his having pocketed the other Rs 71,000 as his share of the plunder? What does he do? He puts the whole matter into the hands of the Commissioner of Police in Bombay, gives him the numbers of *all the 153* notes, and says "please try and trace as many of them as you can." The prosecution, it must be remembered, was sprung upon Zala 14 years after the supposed speculation and it is hardly conceivable that, if guilty, he could have made any preparations to meet such an investigation. Yet if the police enquiry had resulted in the tracing of any of the notes to him he would have been utterly damned. But though 82 in all or at all events, 71, were eventually traced to the Wazir, not a single one was traced to Zala's possession, nor has anyone ever come forward to say that any note out of all the 153 was negotiated or dealt with in any way by him. There was no suggestion that he had incurred large expenditure since 1892, or lived extravagantly. He was not a rich man; all the property he owned in Junagadh was not enough, according to Mr. Rendall, to pay the fine imposed upon him, and he is now admittedly a pauper. Yet he and his fathers before him for several generations had been high in the service of the State, and would therefore naturally have accumulated a modest fortune. Surely this does not look like the case of a corrupt official who has made Rs 70,000 by one nefarious *coup*. That after more than 14 years it should not have been possible to trace all the notes to the Wazir is, I should have thought, not very remarkable, and can hardly be taken as presumptive evidence that any of those which were not traced went into Zala's pocket. Mr. Robertson is less emphatic on this point than Mr. Rendall, but he puts it at least as high as is possible. He says.—

"It is extremely unlikely that a man like (Zala) who is proved to have had a hand in concocting *rukas*" (but see as to this paragraph 13 above) "would allow large sums of State money that were being secretly disposed of, to pass through his hands without some at least of it remaining in his pocket" (paragraph 30 of his note).

and again

"Even if (Zala) did not share in this sum (which however is extremely doubtful)....." (paragraph 32).

I will only say on this aspect of the case, that altogether apart from any technical question of evidence, I can see nothing whatever to justify such a presumption, and I cannot conceive that a criminal conviction should be maintained upon it.

Another point to which I should advert is the bribery suggestion which has evidently weighed considerably with Mr. Rendall, and to some extent with Mr. Robertson. The Wazir in his answers to the interrogatories administered by the commission stated that Zala had told him that he wanted the Rs. 1,53,000 for "bettering the interests of the State," a phrase well known in Kathiawar as meaning bribery, and the suggestion at that time was that Zala had taken the money for this purpose and had pocketed it. Having regard to the way in which the Wazir's examination on interrogatories was conducted, it is at least doubtful whether this was the Wazir's own statement or merely put into his mouth. But seeing that the main purport of his deposition, namely, that the money had never been returned to him in any shape, is now admitted to have been deliberately untrue, I am altogether at a loss to understand how this particular statement as to bribery can in any case be accepted as true. There is no corroboration of it of any sort: no one alleges that bribery was effected or even attempted: nor has Zala ever been charged with it. What happens is that the charge made against him, and the only charge ever so made, is disproved in the most emphatic manner, and then the British official before whom his case comes in revision says in effect: "It is true that the charge of misappropriation has broken down, but I am convinced that the money was intended to be used for corrupt purposes to which you were privy, and therefore I decline to interfere." To me this appears to be a monstrous attitude to take up.

But not only is there no scrap of evidence other than the Wazir's deposition to support this suggestion of bribery, but the explanation offered on Zala's part of the money being remitted to Bombay in this secret manner appears to me to be far the more probable of the two. His suggestion was that the old Nawab Bahadur Khanji, having died in 1892, the Wazir was very doubtful whether he would be able to maintain his position under the new régime and that he was anxious to convert as much as possible of his accumulated hoardings into a portable form as provision against the anticipated "rainy day." It is admitted that about the same time that the Rs. 1,53,000 were sent to Bombay, the Wazir purchased thousand rupee notes for no less a sum than Rs. 2,50,000 from the Tankshal or Treasury officer (paragraph 23 of Mr. Robertson's note) and it seems not *a priori* improbable that having got all he could locally, he sent the balance of his funds down to Bombay to be similarly invested. This, at any rate, seems to me to be a much more likely explanation than the bribery story, and it certainly is just the sort of thing that is constantly happening in Native States when a change of Ruler makes the position of a quondam favourite temporarily precarious.

There is only one more argument with which I need deal and that is Mr Rendall's appeal to "the prestige and authority" of the late Nawab (see at the end of paragraph 8 of Mr. Rendall's letter). The position he takes up is that not only was the original trial before the commission a proper one, not only was Zala's conviction by it just, but above all it was "decided by the Nawab Sahib in person." The real gist of the arguments is hardly as he puts it. It is that whether the conviction was right or wrong, just or unjust, it was the act of a Native Ruler, and therefore an act with which the British Government ought not to interfere. Now this might be an argument of weight in some cases, but it can hardly avail here. The Nawab was, to use Mr. Rendall's own words, a "mere puppet or figure-head," and it is idle to suggest that the Hazur Firman by which Zala was consigned to ruin was anything more than the act of Mr. Baig by whom it was issued. But even if the injustice done was really the act of the Nawab, the true facts came to light during the British régime, and were judicially investigated by British officers, and it is against their action that the present appeal is brought.

I do not wish to lay any stress on the offer of a compassionate allowance of Rs. 300 per mensem which was made by Mr. Rendall to Zala in the spring of 1916 and which Mr. Rendall says was made "purely as a matter of grace and favour." I will only say that if it was so, it is somewhat unfortunate that one of the conditions insisted on was the withdrawal by Zala of all his claims against the State, and that Mr. Rendall should have treated his refusal to do so as contumacious. I cannot help thinking that if Zala was the criminal he is made out to be he would gladly have accepted this offer. The altogether overbearing attitude assumed towards him by Mr. Rendall is further shown by the terms of his rejection of Zala's last appeal, the prayer of which though couched in the actual terms of the rule, was declared to be grossly insolent.

Treating this case from the purely legal point of view I have no hesitation in saying that the conviction of Zala was a gross injustice and ought to be set aside. It was admittedly a conviction on false evidence, and was in my opinion the foregone conclusion of a collusive trial, for which a British (or *ex-British*) official was primarily responsible. If the conviction was false, I cannot conceive that when the State is under British management we can refuse to set it aside. I quite recognize that I may be laying too much emphasis on the legal point of view, and too little upon political expediency, but I cannot believe that what is gross injustice legally *can* be right politically. If this is even possible in India there must be something very wrong with the methods of our political administration. What I am most concerned with is that a

conviction obtained upon false evidence and upon a collusive trial should be set aside : I am anxious that this should be done for the sake of our good name in India. This case has been an open scandal in Kathnawar, and if we, when we take over the administration of a State, countenance such things, how can we hope to raise the tone of any Native administration.

As to what form of restitution should be made if the conviction is set aside, I leave to the political authorities to decide. I know that it is hard to ask a State to disgorge, but in the present case the State has actually made Zala pay Rs. 61,000 which it has now recovered in specie from the Wazir, and has thus pocketed twice over. In addition to this there is at least another Rs. 10,000 fully traced to the Wazir, who has been made to hand over the larger part of his fortune to the State, and over and above this sum Zala has been fined another Rs. 25,000. Natural justice would require that the property which has been confiscated should be restored with mesne profits or interest since 1906, but no doubt Mr. Rendall would not desire to have Zala back in the State, and I have no doubt that if it is desired on behalf of the State to make a bargain with a man in Zala's straits, it can get off with a good deal less than "natural justice."

I greatly regret that my note has run to such inordinate length. The case has been a great labour to me at the busiest time of the year, but I feel very strongly about it, and I have at least not spared myself. There are many passages in my note which I should have been glad to omit, but I have revised it most anxiously throughout, and I feel that I should be shrinking from responsibility if I glossed over what seem to me to be the most unfortunate features of the case.

II.

(28th April, 1917).

I AM afraid I do not know what is the form of enquiry "ordinarily adopted in a political case" in which Zala would be "the plaintiff". Is it intended that he should be treated as suing for the restoration of his property to which the State puts in a defence alleging that he has been justly deprived ? This is the only form of enquiry I can think of in which Zala would be in the position of a plaintiff, and if this is what is intended the draft in the file no doubt meets the case. But I should have thought that the proposed enquiry would have been rather in the nature of criminal proceedings, in which Zala would have been the *defendant* or the accused. If this is to be so, the material thing would be that definite charges should

be formulated against him which he should be called upon to answer. It is to my mind of great importance to settle beforehand exactly what the nature of the enquiry is to be in its scope. I understand that the old charges formulated against him by the 1906 commissioners are not to be re-opened, and that the new enquiry is to be only as to the truth of the other charges which Mr. Robertson thought to be established by his own investigations. If this is so, it is clearly desirable that these charges should be definitely formulated in order that Zala may know precisely what he has to meet. If this is done and the charges are communicated to him there would, I think, be no necessity to give him a copy of Mr. Robertson's memorandum. In an inquiry of this nature, it would be for the representatives of the State to begin and adduce evidence in support of the charges to which Zala would have to make to his defence. If he is somehow or other to be the plaintiff and therefore to begin, he would apparently have to "prove the negative," which would be rather a strange procedure. In other words he would have to *disprove* charges of which no evidence had been given. It can, I think, hardly be intended that by reason of his former conviction upon charges which admittedly cannot now be sustained, he is to be presumed guilty upon these other charges upon which he has not been yet tried. These are the difficulties which for the moment are rather oppressing me, but it may well be that they arise entirely from my ignorance of political procedure.

I should like to add that I entirely concur in the course that has been recommended by the Hon'ble Mr. Wood¹. I have never intended to prejudge in any way Zala's guilt or innocence upon these new charges. If he is guilty, I am in entire sympathy with the wish of the State Administrators to see him punished. The *only* point I was considering in my former note was whether this conviction and punishment which followed upon the charges originally made against him could rightly be maintained, and these further charges were only material in so far as they had been made a basis for upholding the original conviction. I need hardly say that I neither made nor wished to make the least imputation upon the *bonâ fides* of either Mr. Robertson or Mr. Rendall.

¹Political Secretary.

No. 55.

POWER OF THE GOVERNOR GENERAL IN COUNCIL FOR
REVISING SENTENCES UNDER SECTION 401 OF THE
CODE OF CRIMINAL PROCEDURE AND THE EXERCISE
OF THE ROYAL PREROGATIVE BY THE VICEROY.

(15th March, 1917.)

I HAVE never been quite sure that I could subscribe wholeheartedly to Sir A. Hobhouse's¹ minute of 9th September 1873 which has been so often quoted. In the first place it is, to my mind, not altogether correct to talk of the Government of India as exercising the "prerogative of mercy" under section 401 of the Criminal Procedure Code. The Government of India under this section are merely exercising a statutory power of revising sentences conferred on them by the law of the land, and having exactly the same legal sanction as the powers conferred on a Judge by the same Code. The prerogative on the other hand is something essentially outside the law and over-riding it. Moreover the powers conferred by section 401 only allow remission or mitigation of the sentence awarded, while the prerogative pardons the offence. In the second place, it appears to me that Sir A. Hobhouse¹ has failed to take into account the anomaly which has always affected death sentence cases, and of which the well-known "Maybrick" case is a standing example. This is recognized in the last paragraph of Sir Erle Richards¹ note of 4th March 1917.

In India, as in England, conviction is a matter exclusively within the jurisdiction of the Courts. Neither the Executive Government nor the Crown can set a conviction aside; they can deal with the sentence, or grant a pardon, but the conviction cannot be reversed outside the Courts. In India, probably owing to the difference of weight to be attached to the finding of a Judge as against the verdict of a Jury, not only has a wide power of appeal been accorded in criminal cases, but the executive have been vested with the power of reviewing the sentence and either reducing it or remitting it altogether. So far as the exercise of this power may *in effect* be equivalent to interfering with a conviction, the Courts have always, and not unnaturally, been very jealous of it.

¹Former Law Member.

But the discretion is definitely vested in the executive by the law, and they are bound to give "full and anxious consideration" (to use Lord Crewe's words) to every case in which an appeal is made to them.

I think that under these circumstances it would be wrong for us to lay down artificial rules fettering the exercise of this discretion, but at the same time it must be exercised on sound lines, and in ordinary cases where the trial has been duly conducted by a competent Court, and there is no question of the discovery of fresh evidence after conviction, the functions of the executive may well be limited to considering whether the facts proved justify a reduction of the sentence within the limits allowed by the law for the particular offence of which the accused has been convicted. Within these limits it seems to me that the executive are in at least as good a position as the Courts to judge dispassionately of the merits of the case.

This, however, is as far, I think, as it is possible to go. In all other cases, inasmuch as the discretion exists, it must, I think, be fairly exercised after giving due weight to all the surrounding circumstances.

In the forefront of extraordinary cases, I would put convictions for murder in which a capital sentence has been awarded by the Courts, the exceptional feature being of course that such a sentence once carried into effect is irremediable. I should never myself be prepared to hang a man if I entertained any grave doubt as to his guilt whether dependent upon the facts found by the courts or on the law enunciated by them. But personally I think that even in such cases the action of the executive may well (at all events under the existing circumstances) be confined to commuting the capital sentence for the lesser punishment allowed in all murder cases by the law. To go even as far as this when the facts found by the Courts, if fully accepted, would show no cause for commutation, is doubtless illogical, but where a life is concerned logic must take a second place. The exception is fully recognized in practice; the discretion is there under section 401; and I think it ought to be exercised in favour of the subject.

There are, I admit, cases in which full and anxious consideration of trials duly held by a competent Court lead irresistibly to a belief that there has been somehow or other a miscarriage of justice. Such cases come up at rare intervals before the Privy Council, who advise the direct exercise of the Royal prerogative; and now that this prerogative has been formally vested in the Viceroy,

I think that it would be better that where the Home Department is really satisfied that the conviction was unjustifiable, it should recommend the granting of a pardon by His Excellency. The adoption of this course would probably lessen the friction which undoubtedly exists at present between the executive and the High Courts and would, I think, throw no greater responsibility on either the department or His Excellency than they now sustain.

The particular letter of the United Provinces Government which has caused this reference appears to me to be largely ironical and not to need any very serious reply. I should be inclined to tell them that it is not proposed to lay down any hard and fast rules for dealing with cases under section 401, and that so long as they exercise the discretion vested in them after "full and anxious consideration" of every case, they will have sufficiently discharged their duty.

No. 56.

I—VI.

RECONSTRUCTION OF ERNSTHAUSEN'S INDIAN BUSINESS.

[*The Indian Companies (Foreign Interests) Act, 1918.*]

I.

(29th March 1917).

THE reconstruction of Ernsthausen's Indian business as a Company constituted under Articles approved by Government directly raises the question of the future control of such companies, as it is obvious that they can hereafter change their Articles in any way they please, and, with the leave of the Court, their Memorandum of Association. It is perhaps worth considering whether our *post bellum* legislation should not provide for special control in all such cases.

II.

(16th April 1917.)

Speaking generally, what I think we shall want after the war is legislation to provide that no company which has come under the ban of our Hostile Foreigners Trading regulations and has been allowed to trade under license or conditions, or has been reconstituted under conditions to which the Government of India have assented, shall be allowed to alter its constitution in any way without the consent of Government. It will no doubt be useful to wait and see what they do in England, but we ought to be ready with our own policy *before* the war comes to an end.

III.

(16th August 1917.)

I FEEL that my note of the 16th April 1917 (page 2) has been a little misunderstood. It was in the first place specifically confined to *Companies*, though Mr. Slater's¹ note of 24th April 1917 seems to have understood me as also referring to *firms*. The differences

¹Mr. S. H. Slater,

between the two cases are of course obvious, as though it may be a simple matter to legislate for Companies which have a definite legal constitution, it is probably impracticable to deal altogether on the same lines with firms.

In the second place, by the no doubt somewhat loose expression "come under the ban of" in my note, I had no intention of referring to Companies which were only technically within our restrictive regulations but to those the continuance of whose business we were only prepared to allow under restrictive conditions.

So far as legislation on the lines of the English Act of 1917 is concerned, I understand that the only Indian Company to which such legislation would at present apply is the Ernsthausen's East Indian Export Company, though the new Burma Rice Mills Company may possibly come into the same category when it is incorporated. The case of Companies registered in England is of course already provided for. Under these circumstances the proposed legislation though no doubt desirable will be obviously very limited in its application.

But it seems to me that this will not be sufficient, inasmuch as it will not provide for any similar control over other Companies which are now only allowed to trade under license or conditions, and I suggest for the consideration of the Department of Commerce and Industry whether it might not be desirable to insist on such Companies adopting similar provisions in their Articles of Association in order definitely to bring them under the same statutory control. I presume that all such Companies (I do not know how many there are, but there seem to be a good many in Mr. Slater's

Printed list of hostile firms permitted to trade in India. list) have been dealt with on restrictive lines because of their

"hostile associations," using this term in its widest sense. It is possible I imagine, having regard to the powers conferred by section 4 of the Enemy Trading Act, 1916, so long as this Act is in force to impose practically any conditions upon them, and it seems to me that it would be worth while trying, at all events, to get them tied down to model Articles of Association which will give us an effective control over their constitution after the war. It may also be worth consideration whether some of the more important *firms* who are now only allowed to trade under restrictive conditions might not also be brought into the fold on the same lines by being caused to convert themselves into Companies. Having regard to the frequency with which firms are now converted into private Companies there could hardly be any practical hardship in insisting on this being done. If the powers conferred by existing legislation are found insufficient for this purpose additional powers could no doubt be

provided for by any Bill which is ultimately introduced on the lines of the Companies (Foreign Interests) Act, 1917.

In my note of 16th April 1917 I suggested that such Companies should not be allowed to alter their constitution in any way without the consent of Government. Mr. Slater thinks (page 4) that it would be sufficient to prohibit only alterations which would have the effect of throwing the control into other hands, but he has I think failed to see that my recommendation was only intended to apply to Companies and not to firms and I used the word "constitution" to cover both the Memorandum of Association and Articles of Association, (see in this connection my note of 29th March 1917 at page 1). How far this restriction should go is no doubt a matter for consideration, but personally I would prohibit in such cases *any* alteration of their Memorandum or Articles without the consent of Government. Such alterations are not of frequent occurrence in the case of Companies, and it would I think be safer to retain general control so as to save disputes as to whether any particular alteration that a Company wished to make was within the prohibition or not. It has also to be borne in mind that after the war various devices may be adopted by Companies who had previous enemy associations to get back to their old connections, and it seems to me to be very desirable that our control over them should be as wide as possible. Any obviously innocent alterations in the Articles would no doubt be acceded to by Government without demur.

IV.

(1st October 1917.)

If Commerce and Industry are satisfied that none of the other companies or firms are of any importance, I have nothing more to say. I only wished to point out that we are in a position so long as the war legislation holds to enforce practically any terms upon them, and that we shall not be able to do so afterwards.

The proposed legislation will apparently only apply to a few companies, but it will no doubt be useful in their cases.

V.

(2nd February 1918.)

I certainly had no intention of suggesting that we should control the constitution of companies registered in England, *vide* paragraph 2
MC42 LD

of my note of the 16th August 1917 (page 7) where I say "the case of companies registered in England is of course already provided for." Personally, I did not know that the Burma Corporation (Bawdwin Mines) mentioned in paragraph 1 of the despatch was registered in England or I should probably have referred to the fact when the despatch came to me for signature. We can no doubt if it is thought desirable, legislate to prohibit the trading in India of any "key industry" firms who are not companies registered in some British possession under article approved there, but this is rather a different and a much bigger question than the one I was considering on the file preceding the despatch.

It is quite true that the proposal I made in paragraph 5 of my note of the 16th August 1917 goes further than the provisions of the English Act, and I have there given my reasons which I still think to be sound. I have no doubt that we in India can get drastic conditions of this sort through in legislation without difficulty. In England, owing to the greater variety of commercial interests involved, they probably had to be content with less, but this is no reason why we should take less than we think to be desirable.

The answer to the second question in the Secretary of State's telegram should I think be that the legislation we have proposed will apply only to companies registered in India.

VI.

(27th June 1918.)

We have departed considerably from the English model in this case, but I think that the draft Bill covers all that Commerce and Industry want. The English Act is a difficult and complicated one, and there seems to be no particular reason why we should follow its provisions slavishly.

In discussion with the Hon'ble the Commerce Member some little time ago it was agreed that the Act should only be applicable to the very small number of companies upon whom model articles had been imposed, and it was thought that there would be no difficulty in notifying them. If this were not done, it would be impossible for any company safely to alter their articles without applying to Government for a "pass".

I have resettled the draft provisionally with Secretary. I am anxious to leave as few loop holes for evasion as possible.

No. 57.

ADMINISTRATION OF BASRA.

(4th April 1917.)

It appears to me that this is not a question for the Government of India so much as for the Home Government. We are, I take it, only the agents of the Home Government in the matter of the administration of Basrah. If Mesopotamia is to be annexed eventually, it is at least doubtful whether it will be put under the Government of India and at the present moment we have no power to expend the revenues of India on the development of Basrah

Our present position in Mesopotamia is only a temporary military occupation, under which the military authorities can take over for military purposes any area they require, and I do not think that as long as this temporary occupation continues, they should attempt to use their *de facto* authority to acquire permanent rights. In any case they would only be justified in doing this by ordinary negotiations with the owners.

I do not think that there need be any great fear that this will be the only opportunity of acquiring the land at a fair price. If it is eventually decided to annex Basrah, the British Government will not be legally bound by any previous concessions by the Turks. No doubt by the ordinary principles of international law we should respect the rights of private property in the annexed territory, but

it would not be competent to private individuals to assert these rights in the municipal courts,* and as long as Gov-

*See Cook v. Sprigg in the P. C. 1839 Appeal Cases 572.

ernment paid fair compensation to any persons whom for public reasons it might be necessary to expropriate, their action could not be challenged in the courts. No doubt, if it is decided to annex, the question as to what land may have to be taken up for public purposes and the compensation to be paid for it will be carefully considered.

No. 58.

ADMINISTRATION OF MESOPOTAMIA AND ARABIA.

(12th April 1917)

I doubt if I am qualified to offer an opinion on this big question.

Foreign and Political Department
Diary No 6275-W. of 1917.

In the first place, however, I would venture to record my complete agreement with the proposal that the Basrah Vilayet should be formally annexed, and I presume that it will follow that the Turkish pretensions to sovereignty in Koweit will also be finally disposed of. It appears to me to be of vital importance to the empire that the head of the Gulf should be definitely in our hands and that our influence in Koweit and Buhian, no less than in Basrah itself, should be established beyond possibility of question. There must be no more "Wonkhausing" in the Gulf in future.

At the same time it seems to me that Basrah being, I suppose, about 1,400 miles distant from Karachi, the nearest port in India, and mails taking in normal times over a week from here, it would be very difficult for us in India to administer it satisfactorily. There would, I think, be much the same difficulties, only in an aggravated form, which have so constantly beset the question of Aden. It would also, I think, be somewhat of an anomaly to declare the Basrah Vilayet to be a part of British India, which would be the only way in which it could be brought under our administration; and this of course would have to be done by act of Parliament. The difficulties, for instance, of the representation of Basrah in our Imperial Council, of getting the information to deal with questions and resolutions of local interest, and the absurdity of having them discussed and voted on by our Indian members would be almost insurmountable; and yet, if Basrah is to be a province of British India, we could hardly deny it these rights. Moreover, if Mesopotamia is really to be industrially developed again with the Basrah Vilayet formally annexed and Baghdad practically so, though nominally under protection only, it may develop so rapidly and into so big a concern that we could neither work it nor finance it satisfactorily. In this connection it is worth bearing in mind that Basrah was formally possibly the greatest emporium of the Turkish Empire in the East, and may become of the same importance again in the 20th century.

I do not think myself that there is any half way house possible between making Basrah a province of British India and its being under an absolutely independent administration. I do feel that we shall be indented upon pretty heavily for its military protection and administrative officers. If large irrigation works are to be undertaken, then probably India, the only country that can

supply the experience required, and we shall have to take these requirements definitely into account in our recruitment, especially in the case of the Army and the Public Works Departments. But as long as we know beforehand what demands will be made upon us, and it is recognised that our own interests must be the first consideration in every case, and that we are not to be called upon to bear any part of the cost, I do not see that the new situation need cause us more than temporary inconvenience and for these reasons I should not be prepared to dissent from the Home proposals.

At the same time I recognise that India has already very large interests in Iraq, and will undoubtedly have larger interests in the future. If a big scheme of irrigation is to be taken in hand and cultivation initiated upon large lines, Indian colonisation will be almost a necessity. India also undoubtedly looks forward to a great development of her trade with Basrah and to the new country behind it as a market of first-rate importance for cotton, jute, tea, tobacco, timber and even coal, and the Indian blood which has been shed there certainly entitles her to a considerable stake in the country. I think, therefore, that if it is to be under an altogether independent administration, the peculiar interests of India in its development ought to be very definitely recognised from the outset, and I should like to see this insisted upon with some emphasis.

I also think that if the Basrah Vilayet is not to be Indianised in any way, the Home Government *must* recognise our claims in the conquered territory of East Africa, and that this should be urged upon them again with the utmost insistence. Personally I should be more than satisfied to have no share in Mesopotamia if we can secure for India a definite sphere of interest in East Africa. In the redistribution of territory after the war India is fully entitled to and *must* have her reasonable share, and I think that we should be very wrong if we did not press this for all we are worth. If she is to be left out in the cold and see German East Africa simply handed over to the Union without any provision being made for her interests, there will be great and, in my opinion, legitimate dissatisfaction in India, and this question has to my mind become of prime importance now that we have deliberately cut ourselves off from practically all existing fields of emigration.

With regard to the Iraq Code, with which however we are hardly concerned, I fully agree as to the danger of trying to introduce a ready-made system of Indian law into such a country, and when its sponsor was over here last year we in this Department, made strenuous though ineffective attempts to discourage his energies in this direction.

With regard to Aden, I can only say that I think we should welcome the proposed relief.

No. 59.

EXAMINATION OF SECTION 79 (2) OF THE GOVERNMENT OF INDIA ACT, 1915, AS NECESSITATING PREVIOUS SANCTION OF THE GOVERNOR GENERAL TO THE INTRODUCTION OF CERTAIN LOCAL BILLS.

(16th April 1917.)

The first question in this case is obviously one of policy, but it is mixed up with that of procedure. Under section 79 A., December 1917, Nos 32—37 (2) of the Government of India Act the Local Government cannot repeal or alter any provision of an Imperial Act without the previous sanction of the Governor General, and as Mr. Chintamani's Bill proposes amendments of Acts XIII of 1879 and XIV of 1891, it clearly requires sanction before it can become law. But I doubt if section 79 (2) necessitates (or even contemplates) sanction previous to introduction. It is quite true that in this department we have adopted the view that section 79 (3) involves sanction previous to introduction, but the wording of 79 (2) is very different, and as it seems to me, the considerations involved are also different. What is to be sanctioned under 79 (2), and therefore to be considered by the Governor General, I think, is some final proposal of a Local Government for the amendment of the general law; while under 79 (3) it is the discussion with a view to legislation which is forbidden without previous sanction. It may be difficult for the Governor General to decide, at all events in many cases, whether a particular amendment of the law may or may not be desirable until he knows in what form the Bill is likely to be passed. It may very well at the introduction stage contain objectionable features which will be eliminated after discussion in the local Council and may emerge from Select Committee in a form which would be acceptable. Moreover, if sanction under 79 (2) is given before introduction it can only be, one would think, to the Bill as introduced, and could hardly cover the Bill in its final form if materially altered in any way, and it would hardly be wise for the Governor General to commit himself beforehand to any variations which he had not considered. I should therefore feel great difficulty in advising that a Bill proposing to amend a law passed by the Imperial Council could not be introduced in a local Council without previous sanction under 79 (2).

Whether the Bill should be opposed on the motion for leave to introduce is, to my mind, quite a different question. It

cannot, I think, for the reasons already stated, be so opposed merely on the ground that the sanction has not been obtained though it can of course be thrown out, if the proposals are altogether disapproved in the ordinary way.

I am, however, not personally satisfied that Mr. Chintamani's proposals are all of such a nature that the Bill ought to be voted out at its initial stage. I think that the question whether some proportion of the Oudh Judges ought not always to be drawn from the legal profession is a fair question for their Legislative Council. It is, in my opinion, right that within reasonable limits their wishes should be acceded to, and it cannot be suggested that if they ask that one out of three Judges should always be appointed from the Bar, this would be in any sense unreasonable. If, therefore, Mr. Chintamani were prepared to modify his Bill to this extent, and the Council accepted it, or if it were so amended, I do not think that sanction should be refused to it under 79 (2). Sir Reginald Craddock thinks that the separate existence of the Oudh Court is such an anomaly in itself that we should not allow any tinkering with it. In this view I do not agree. I would much rather see a High Court established for the whole of the United Provinces, but I doubt if this is likely to be possible for some time to come, and in the meanwhile I can see no reason why a particular reform which it may be will be welcomed in Oudh, should be tabooed. My Honourable Colleague also suggests that Mr. Chintamani is a person to whom no consideration need be shown. This may be true, but the proposal may be a good one for all that, and if it is supported by a large majority of the Indian members, I do not think that it matters who introduced it. My own view is that this part of the Bill at all events may be usefully discussed in the local Council, and if all or a considerable majority of the non-official members support it, I think myself that the amendment should be accepted by the Local Government, and the sanction of the Governor General accorded to it.

With regard to the proposal that the Judicial Commissioner should always be a professional lawyer, I agree with the Home Department that this should not be entertained. It would however be sufficient to leave this part of the Bill, if Mr. Chintamani insists on pressing it, to be dealt with in the ordinary way, though sanction should certainly be refused eventually if the Council were prepared to accept it.

I am in entire sympathy with the proposal to reduce the maximum monetary limit of the value of appeals heard by a bench

of two judges, but I agree that on the ground of expense this must stand over for the present .

I feel that there may be some difficulty in deferring the question of sanction under 79 (2) to a late stage in the progress of the Bill, but I think that it would be sufficient at all events for the question to be sent up after the Bill had emerged from Select Committee, as that would give at all events a reasonable indication of the form in which it was likely to be passed. The difficulty, however, is one that arises on the form of section 79 (2) which might, I think, have been better worded.

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No. 60.

CONSOLIDATION OF MERCHANT SHIPPING LAW.

(18th April 1917).

THIS case is undoubtedly beset with difficulties, and there are Legislative Department unofficial obvious pitfalls to beware of No 285 of 1917. I quite agree that we cannot tinker at our 1859 Act. We have apparently sent up various Bills with this intent to the Secretary of State in past years and they have always fallen under his ban. A general revision or consolidation of the law for India has often been cheerfully anticipated, but I doubt if it is within the legislative horizon at all now. It is essentially a matter for experts, and I know of no lawyer in India with the requisite experience: indeed, the Merchant Shipping Law very seldom comes before Indian courts in any shape, and it will be a matter of great difficulty and prolonged labour. It is at all events possible that after this war the consolidation of Imperial interests may necessitate a general revision of the Merchant Shipping Law for the Empire, as it is notorious that the provisions of the existing law are anything but popular with the colonies. Anyhow I do not think we can say that a revision of the Indian law on the subject is so likely to be undertaken in the near future that really necessary and simple reforms should be made to wait for it.

What we can do in this case without encountering any very serious difficulties is to adopt (in virtue of the powers conferred by section 264 of the Merchant Shipping Act, 1894) the provisions of section 92 of that Act so far as it does not already apply. Under section 261 (c) it already applies to British ships on the Indian register when trading between ports in the United Kingdom and non-Indian ports. It does not apparently apply to such ships when trading between Indian ports and any other ports; but we can, under section 264, by an Act of our Legislature so apply it, and the application will have extra-territorial effect, which we could not give to any enactment of our Legislature apart from this section.

The Bombay letter is not very clear; but I assume that when they refer to "section 92 of the English Merchant Shipping Act, 1894" they mean the section as amended by the Act of 1906. If this is so, the course I have suggested as possible, will meet their requirements. We certainly cannot attempt to do more than this. We could hardly suggest to the Secretary of State the adoption of stringent conditions which have already been struck out of the general Act, and this would be especially the case at the present time when there is probably a great depletion of certificated officers. It would appear from the Bombay letter that all they really want is the application of section 92 (c), which deals

with the case of a Second Mate where more than one is carried; (a) and (b) of the section are already covered by section 13 of Act I of 1859, and (d) and (e), which relate to engineers, appear to be practically the same as the provisions of Chapter III of Act VII of 1884. I do not think, therefore, that anything further is required in their case.

I think that Commerce and Industry Department must decide whether the action which I have suggested above is really required, having regard to the existing powers *qua* native passenger ships,

A. M. S., July 1915, Nos. 167-168 pilgrim ships and emigrant
F. No 52) page 5 of notes. ships (see paragraphs 10 and
11 of Secretary's note of 20th

May 1915) and, if they think it is, they must get the assent of the Secretary of State to the proposed legislation before they ask us to draft. It will probably also be desirable to consult the other maritime Governments on the subject.

No. 61.

(I—II.)

PROPOSED REPEAL OF THE DEKKHAN AGRICULTURISTS
RELIEF ACT, 1879.

I.

(1st May 1917).

IN THIS case there is very little for us as a department to note upon at this stage. Bombay can only repeal for their own province, and if the Act of 1879 is to be wiped out from the Statute Book altogether it will have to be done by the Government of India.

Home Department Judicial A.,
Proceedings, December 1917, Nos. 158-159.
(Legislative Department unofficial
No. 308 of 1917.)

Under ordinary circumstances there would be nothing more for this department to say until the general policy to be adopted by the Government of India had been finally settled between the administrative departments concerned, and I should no doubt have an opportunity of considering the question of policy at another stage of the proceedings. But as I have read the papers at some length, it may be useful for me to record my present opinion on the subject generally.

On genera' grounds I should be inclined to agree with Sir Claude Hill¹ that the proposed local legislation was not necessary. The existing Act is clearly a bad one, but the position of agriculturists in the Bombay Presidency has greatly improved since the Act was passed. There would seem now to be no very special evils to be remedied, and if general legislation is to be undertaken for the control of usurious transactions it is quite possible that this should be sufficient.

But I do not think that we ought in such a case to overrule Bombay. The local Government are emphatic in their demand for a special Act; Mr Curtis, whose opinion Sir Claude Hill quotes in support of pure repeal, is a Member of that Government, and is presumably in general agreement with the policy advocated by them. The High Court, which includes Judges who have had a long experience of the local requirements, unanimously support the demand; and the Commission of 1912 whose Report is a most careful and valuable document, strongly recommend legislation on these lines. The Bombay proposals, therefore are strongly backed, and I do not think that we should be justified in overruling them,

¹Re enue Member.

at all events at the present stage. The Bill, if introduced, will be fully discussed in the local Council and much useful light may be thrown on the particular points in controversy, and this may eventually lead to reconsideration.

With regard to the detailed proposals of the Bill, I agree that the definition of an "agriculturist" will require further consideration. The only justification for class legislation of this sort is the necessity of protecting persons who are unable to deal with a money-lender on equal terms. Probably no definition can be devised which will exactly attain this object without including some other persons who do not require protection, but it must, I think be one which will not give rise to an issue of fact at the outset. I am inclined to think that the notification of particular castes in particular areas is a measure which will practically produce the best results. We should, however, in any case ask Bombay to consider this question further.

With regard to the requirements as to accounts, I quite agree that this will not be altogether effective, as there are many persons in desperate straits, and many utter spendthrifts, who will sign anything to get a little ready money, and it is, I think, impossible to attempt any form of legislation for extreme cases of this nature. On the other hand, I believe that a provision of this sort will be beneficial in ordinary cases: it is not oppressive to the lender, and it does afford protection to the average borrower. It entirely precludes the substitution of false entries after the transactions have been going on for some time, and when the parties are at arms length, and this is a sort of fraud which is common in the worst kind of money-lender cases. If a provision for duplicate accounts signed by both parties is adopted, it means that the fraud, if there is any, must be one known to and agreed upon between both parties from the very outset of the particular transaction, and this would only occur in exceptional instances, and in the case of a borrower who was almost beyond the possibility of protection. The system has been tried in many places and has evidently been found to work satisfactorily.

As to semi-penal provisions of this nature prejudicing the credit of agriculturists generally, this no doubt is true to some extent. The imposition of new and stringent measures always temporarily disturbs the course of business, but after a time when the working of the new law is familiar to the parties such questions have a natural tendency to adjust themselves. The law of demand and supply asserts itself, and the need for money on the one hand, and the possibility of employing it at a reasonable rate of interest on the other, will inevitably bring borrowers and potential lenders

together. Some dislocation of the old relations will no doubt occur, but unless the new law is an exceptionally drastic one, this will only be of temporary effect. Such an interruption of the old course of dealing tends, I believe, on the part of the borrower to foster thrift to some extent, and on the part of the lender to encourage the more reputable sowcars. Personally I should be glad to see any legislation of this sort accompanied by a greater spread of Co-operative Credit Institutions which are, to my mind, the most effective remedy in all such cases.

In connection with the question of mortgages and fictitious sales, I fully agree that to let in evidence of an oral agreement at variance with the written document must always lead to the multiplication of false witnesses and can be of no real assistance to a Court. If Judges would content themselves with going behind the documentary transaction only in cases where the surrounding circumstances afforded some ground to suppose that it did not represent the real transaction, there would be a better chance of their doing effective justice between the parties, and I should welcome any change in the existing law which would have this effect. A lender is as much entitled to equitable treatment as his borrower, and there is no doubt that under the existing provisions he often meets with scant justice at the hands of the Court.

II.

(26th June 1917).

THE objections of my Hon'ble Colleague in the Home Department to the provision of clauses 16, 17 and 18 of the Bill go rather beyond the new part of clause 18 to which Deputy Secretary refers, and similar doubts underlie many of the other criticisms of the Home Member on the details of the Bill. As to the new part of clause 18 ("for such period. . . after that date"), I agree that the provision goes rather far in favour of the debtor, and I doubt if this is necessary.

But to my Hon'ble Colleague it is not sufficient that a particular provision were embodied in the original Act or inserted by a subsequent amendment, though the Act being Imperial one such provisions must have been definitely approved by the Government of India at the time; he wishes all these provisions to be reconsidered now, whether the Committee or the Bombay Government have dealt with them or not. What, however, I venture to think is really required is to make it clear that clauses 16, 17 and 18 as

well as other clauses of the Bill, are only to be applied to exceptional cases, and are not to be matters of ordinary procedure. One of the main reasons for the comparative failure of the old Act, was that the Courts insisted on reading permissive provisions as obligatory (*vide* paragraph 21 of the Report), and it is obviously desirable that this practice should not be continued under the new Act. The powers conferred on the Court by clauses 16, 17 and 18 are, I think, equitable, and will be useful in the future, as they have been in the past, when applied to exceptional cases where there has been an unconscionable bargain, but the Bill should make it clear that they are only to be so applied. I may refer in this connection to paragraph 6 of my Hon'ble Colleague's note with which I am in full agreement.

Clause 10 of the Bill—(Paragraph 7 of Sir William Vincent's note). This clause makes it optional to apply the "rules" there formulated (page 7, line 2 of the Bill, "may"). but once a Court decides to do so, the "rules" are apparently rigid, and sub-clauses (a) to (f) of clause 10 are all "shall". This, I think, is a mistake and the procedure will suffer for want of elasticity. As to *dadupat*, the provision with reference to which date, back to 1877, the Committee apparently had nothing to say on the subject, and I should be quite willing to ask the local Government to consider if this provision is really necessary. The rule apparently applies as between Hindus in the Bombay *mufassal* (*see* I. L. R. 20 Bombay 611, a case from *Dhulia*) and it may be thought desirable to retain it as a substantive provision in the new Act.

Clause 14 of the Bill.—(Paragraph 9 of Sir William Vincent's note). The provision that the Court should not be debarred from passing a decree for redemption merely on the ground that the mortgage debt has not been completely discharged was inserted in the old Act in 1882. It is no doubt intended to meet the not uncommon case where payments on account of interest have really liquidated the original debt over and over again, and is clearly not intended to be for every day application. The chief objection to the clause as drafted is that the proviso makes no reference (as I think it might well do) to cases where part of the mortgage debt is still outstanding but deals only with those where the date fixed for payment has not arrived. The same criticism may, I think, fairly be passed on the last five lines of the main clause, which I think should also give the Court discretion to provide for payment of any balance justly due.

With regard to clause 22 of the Bill, to which my Hon'ble Colleague adverts at the end of paragraph 12 of his note the recommendation of the Committee upon which this is based is, I confess,

one that rather commands my sympathy. They suggested (paragraph 36, page 22) that an amendment to this effect should be inserted in the Registration Act so that it would have universal effect and this seems to me to be a more logical course than the Bombay Government's proposal which would apply it only to the limited class of cases to which their Bill is directed. I may add that a similar amendment of the Registration Act has been pressed upon me from other quarters. My Hon'ble Colleague's criticism on clause 22 is I gather that non-compliance with the requirements of the clause would have no effect, and would be regarded as a mere irregularity curable by section 87 of the Registration Act. In the first place I doubt if this would necessarily be so, see *Ishra Parasad v. Baijnath*, L. L. R. 28 All. 707, and *Jambhu Parshad v. Muhammad Aftab Ali Khan*, 42, L. R., I. A., 22 at page 29. In the second place—if non-compliance with the provisions of the clause is to invalidate the registration (as I am inclined to think it ought) it would be very easy to make this clear by a slight modification of the wording. Lastly, even if the clause is not to be treated as imperative it would only stand on the same footing as other provisions of the Act which may be governed by section 87, and its insertion would at all events ensure the observation in most cases of what appears to me to be a very salutary provision.

Clause 31 of the Bill—(Paragraph 13 of Sir William Vincent's note). I doubt myself if it would be wise to prescribe a minimum rate of 12 per cent. for all cases, but I should not object to the point being put tentatively to the local Government.

I hope I have not gone beyond what was expected of me on the further reference to this department, but as I had not had an opportunity of seeing the criticisms of the administrative department before, I have thought it better to note at some length upon them.

No. 62.

(I—II.)

APPLICATION OF SECTIONS 128 AND 130 OF THE CRIMINAL PROCEDURE CODE TO THE MEMBERS OF THE INDIAN DEFENCE FORCE.

I.

(2nd May 1917).

IT IS, I think, at least doubtful whether members of the Indian Defence Force could be held to be within the provisions of Chapter IX of the Criminal Procedure Code, and I think that this should certainly be put beyond doubt by a small amendment of the Chapter. This is to my mind the better of two courses suggested by A. D.

Army Department Adjutant General's Branch Case No 46, 849, notes of War 1916-17, No 511
(Legislative Department unofficial No. 340 of 1917).

I agree that the provisions of sections 21, 23, and 24 of the Volunteer Act of 1869 are not of real importance, and may safely be dispensed with.

. II.

(7th July 1921).

No doubt under section 128 a Magistrate could call upon individual members of the Indian Defence Force to assist him in dispersing an unlawful assembly, but this is obviously a very different thing from requiring the force, as a military force under the command of their officers, to do so. I doubt therefore if it would be sufficient to rely upon section 128.

I also doubt whether it would be either right or safe to rely upon using the Indian Defence Force in an emergency as if it were covered by section 130 which it clearly is not. It would I think be very unfair to subject a man to a possible trial and conviction for murder even though he were to be subsequently pardoned. There would also I think be considerable risk of members of the Indian Defence Force refusing to obey an order given to them to fire on a crowd on the ground that such an order was illegal. It must, I think, be remembered that the Indian Defence Force

comprises men who know much more about their legal position than privates in an ordinary regiment would do in peace time.

I think that it would be quite reasonable to introduce this amendment in the Schedule of a Repealing and Amending Act and I am inclined to agree with Sir William Vincent that it is not likely to evoke much criticism. After all it must be remembered that we have practically "disestablished" the Volunteers and set up the "local service" cadre of the Indian Defence Force in its place. There would probably always be Volunteers within section 130 in any Indian Defence Force company which might be used to disperse an unlawful assembly and the inconvenience of having to rely on them alone in such a case would, I think, be obvious even to our elected members.

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No. 63.

INTERPRETATION OF SECTIONS 40 AND 41 OF THE LAND ACQUISITION ACT, 1894. (ACQUISITION OF LAND FOR A SHIP BUILDING COMPANY).

(7th May 1917).

THE preliminary enquiry under section 40 of the Act must satisfy the Local Government that the work is likely to prove useful to the public, and under section 41 the agreement to be entered into by the Company must provide facilities for its "use" by the public." The terms "useful" in sections 40 (1) (b) and 41, and "use" in section 41 (5) are, I think, clearly correlative, and though the wording is not very happy I think that the measure of public "use" under the latter provision need only carry out the public usefulness referred to in the former. The difficulty of course is that section 41 (5) speaks of the public using the "work" while what is really intended is only that they are to have the benefit of the work. For instance, supposing it was a case of gas-works it could hardly, one would think, have been intended that the public should be entitled to use the gas-works but only that the finished product, viz, the gas, should be at the service of the public; and this has, I believe, been the view adopted in practice. In the case of the Tata Hydro Electric Scheme in Bombay in which I think the land was taken up by Government under the Act, the public has no right to use the "work" in its strict sense, but the Company are bound by their agreement with Government to make the power they produced available to the public. So in the present case if the building of ships in India is held to be a project useful to the public it would, I think, be a sufficient compliance with the terms of the Act if the ships to be built were made available for Indian use. It might however also be possible to provide that the Company should be bound to build ships for Indian traders, and for Government, and that Government should have a call upon all ships of the Company for public purposes. It would of course be for the Local Government to provide for the terms of the concession, and so long as they were satisfied as to the conditions imposed under section 41(5) the agreement could not be questioned.

No. 64.

TAKING OF OATH BY OFFICIALS APPOINTED FROM ENGLAND UNDER THE GOVERNMENT OF INDIA ACT.

(12th May 1917).

THE original idea, I think, was that the obligation to take the prescribed oath should be imposed in the case of officials appointed from home by the Government of India Amendment Act. The Secretary of State, however, now informs us that we have power to legislate out here. We can no doubt do so, but we clearly cannot make the taking of the oath a condition of (say) the Viceroy assuming his office, and it will probably be desirable that the Letters Patent of his appointment should in future be modified to meet this. For instance, they might provide that he should assume the governance of India on taking the prescribed oath, and this would, I suggest, have also to be provided for in the case of all appointments by the King

It is noticeable that though we in our despatch of 7th July 1916 did not recommend that the Viceroy, at all events should take an oath of secrecy, the Secretary of State in his reply assumes that we did, and agrees that it is desirable. I do not think that we should necessarily take this as final, and personally I very much doubt if the Viceroy should take an oath of secrecy. Looking

None of the other Governors General seem to take an oath of secrecy. at the form suggested by the Home Department note, it is

G. R. LOWNDES] clear that it will not do, and I should have thought that it would be for the Viceroy, as the King's representative, in every case to decide for himself to whom he would communicate anything I doubt if his Council could claim to restrain him doing so, though they might no doubt advise him.

As to the form of the oath of secrecy to be taken by Members of Council, I think that it will require further consideration. If the form suggested by the Home Department is to be taken as the model, I would at all events redraft the last 18 words or so, and make the obligation one to keep secret all information acquired as a member of council unless either the exigencies of public business require its divulgence to particular persons, or the leave of the Governor-General is obtained. If the existing form is adopted he Viceroy would continually have to be telling members of his

Council that they were not to divulge particular matters. It is also obvious that one must communicate things to one's fellow members of council or to other officials in the course of one's every day business.

I suggest that in the case of the Viceroy it would add to the solemnity of the proceedings if the oath to be taken by him were administered by the Chief Justice of Bombay or Calcutta. A Viceroy practically always lands at Bombay and could hardly land anywhere else except at Calcutta. In the case of Governors, the same oath might be prescribed, but without this additional solemnity.

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No. 65.

RECOGNITION BY THE BRITISH GOVERNMENT AS A
CONDITION ESSENTIAL TO THE STATUS OF CHIEF.
SHIP IN A NATIVE STATE*(7th June 1917)*

THE relationship of Native Chiefs in India to the Paramount Power, as I understand it, is based upon the surrender of certain rights of independence on the one side and protection on the other. It is not strictly speaking in the nature of a feudal relationship, though the obligations of a Chief to the British Crown are somewhat analogous to the fealty which the vassal owed to his lord. This obligation is laid on the Chief as the head of his State and not merely as an individual, and protection is guaranteed to him in the same capacity. This seems to me to differentiate the case altogether from one where individual rights alone are concerned as in the case of an English Peer.

It is in my opinion of the essence of such a relationship, based as it admittedly is on comparative strength and comparative weakness, that the Paramount Power should have the right to recognise or to refuse recognition to a particular individual as Head of the State—the right in fact to say that it will or will not accord its protection to that individual as representing the State and exercising ruling powers in it. At the same time in practice it has been found inadvisable to attempt its arbitrary enforcement, and the Paramount Power, while still maintaining its theoretical right, has ordinarily accepted the natural successor of a deceased Chief unless there was manifest reason to the contrary. This has crystallised by degrees into a definite practice which no doubt tends to obscure the original right of the Paramount Power, and it is only the exceptional cases in which interference is necessary that necessitate reference to it. In ordinary cases the recognition is no doubt merely formal, but it is none the less essential as the outward sign of suzerainty. All that the Paramount Power has conceded by its practice is that it will recognise the customary successor, not that recognition will be dispensed with.

It can only be, I think, on the right to refuse protection that a claim to decide disputed cases of succession can be based, otherwise the legal heir would be entitled to succeed, and it would only be necessary for him to prove his heirship. It was, I take it, in virtue

of this right that the adoption Senads were granted : If it had not

*I do not follow my Hon'ble Colleague, Sir C. Sankaran Nair's argument with regard to adoption. There can be little doubt that in Native States in which the custom of adoption prevailed the adopted son of a Chief was entitled in pre-British days to succeed to the *gadi* just as much as a natural born son.

existed they would not have been a concession.* The right of deposition, again, which the British Government has always asserted, though ordinarily spoken of as an Act of State, is only another off-shoot of the same theory.

It seems to me, therefore, clear that in principle the suzerain must have the right to recognise or refuse recognition to the successor of every Chief and that recognition should be insisted upon in every case as essential to the status of Chiefship. It is not, I think, a question which may vary with different States, but is an essential of the relationship between all States and the Paramount Power.

That this principle has been definitely recognised in the past policy of the Government of India is in my opinion, fairly established. This appears sufficiently from the draft despatch, † and the

†Pro No 4.

Colleague, Sir William Vincent. There is, therefore, no need for me to elaborate the point, no words could be more emphatic than

‡Political A., March 1880, Nos. 117-118.

down that in every case whether the succession is disputed or not formal confirmation and recognition by the Paramount Power are required, and the point was again emphasized§ in 1891 when Lord

§cf Secret E, June 1891, Nos 101-156, correspondence, page 24

until recognition had been given. These pronouncements were clearly dealing with general principles and not merely with the facts of particular cases. It is also, I think, important to remember that this principle has been recognised and asserted by writers of undoubted

||Secret I, March 1917, Nos. 46-52, correspondence, page 119.

passed by the Chief's Conference.

I agree that "recognition", or "recognition and confirmation", better describe the function to be exercised by the Paramount Power than the words "approval and sanction" which were first employed.

evidence of it is summed up in the note of my Hon'ble Colleague, Sir William Vincent. There is, therefore, no need for me to elaborate the point, no words could be more emphatic than those used in the despatch‡ of the 3rd March 1880, from Lord Lytton's Government which lay down that in every case whether the succession is disputed or not formal confirmation and recognition by the Paramount Power are required, and the point was again emphasized§ in 1891 when Lord Lansdowne's Government stated that it was fully understood that no succession was valid until recognition had been given. These pronouncements were clearly dealing with general principles and not merely with the facts of particular cases. It is also, I think, important to remember that this principle has been recognised and asserted by writers of undoubted authority, and so far as I know was never disputed until the recent resolution|| was

I would only add that there seems in reality to be very little difference of substance between the view I have ventured to put forward in this note and that taken by my Hon'ble Colleague in the Education Department. He admits that every succession "requires the recognition and confirmation of the Paramount Power" but suggests that it is in many cases only "an acknowledgment of a pre-existing right". In other places my Hon'ble Colleague speaks of the doctrine to which I have expressed my adherence as laying down that "recognition is necessary to confer title", or "that the title is dependent upon confirmation". I am not quite sure that there is not some confusion of thought here. *Title* to property is not on quite the same plane as succession to the Rulership of a subordinate State. To my mind what recognition gives is the right to protection as a subordinate ally, and not merely the right of succession to property, though that may follow incidentally. There can hardly be a "pre-existing rights" to this protection in an unrecognised successio., and it is I think, perfectly correct to say that the "recognition is necessary to confer title" to the *protection of the Paramount Power* or "that the title" to this *protection* is "dependent upon confirmation".

I accept the draft despatch, and have only noted on this point at such length as I understand my Hon'ble Colleague's note as inviting me to do so.

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No. 66.

FORM OF ORDER IN THE EXECUTIVE COUNCIL OF THE GOVERNOR GENERAL WHERE A MEMBER DISSENTS AND THE SIGNING OF DESPATCH BY A DISSENTING MEMBER.

(13th June 1917).

THOUGH my Hon'ble Colleague Sir C Sankaran Nair¹ is not impressed with the importance of the question of procedure, Home Department Public A Proceedings, December 1917, Nos. 53-54 I think that it is clearly desirable to formulate a definite rule of practice in such matters, especially as Minutes of Dissent seem to be increasing in frequency. (Legislative Department unofficial No 734 of 1917)

In the case of our Reforms Despatch Sir Reginald Craddock² thought it desirable to add a postscript with reference to my Hon'ble Colleague's Minute of Dissent. I was, however, very doubtful at the time whether this was correct, and venture to suggest for the consideration of His Excellency and my Hon'ble Colleagues generally that the proper course to follow in all such cases is as follows.

When a draft despatch comes up for discussion in Council and any Member disagrees, the draft must necessarily be altered to the extent of inserting a formal paragraph stating this fact and, where he desires to record a Minute of Dissent, that such Minute is attached. It would naturally be desirable in many such cases that the majority should state why they were unable to agree with the dissenting Member's views and their reasons would ordinarily be brought out in the discussion in Council. Under these circumstances I would suggest that the proper Order in Council would be—

“ that the draft despatch be altered so as to show the dissent of the Hon'ble and the grounds on which the majority in Council are unable to accept his views.”

An alternative and perhaps simpler form of Order would be “ that the draft be altered in accordance with the discussion in Council and be recirculated for signature ”

This, however, would be understood as meaning what is more definitely expressed in the preceding formula. The dissenting Member would then send in his Minute of Dissent, which would be recorded and a copy appended to the despatch, and the necessary alterations in the draft made by the department in charge and submitted to His Excellency. If His Excellency agreed there would be no need to recirculate except for signature.

¹Education Member.

²Home Member.

In the present case I would venture to suggest that the Order in Council was in wrong form and that when the matter comes up again the Order should be rectified.

My Hon'ble Colleague also, as I understand him, proposes temporarily to withdraw his Minute of Dissent, but having regard to Rules 38 to 40 of the Rules of Business I doubt if he can do this except perhaps with the consent of the Governor-General under Rule 43. It seems obvious that if after a Minute of Dissent has been handed in and the draft despatch has been altered with reference to it, a Minute can be withdrawn and one in different terms substituted, there will never be any finality. I venture to think myself that a dissenting Member should state the grounds of his Dissent in Council and that his Minute should only be a formal expression of what he had already so stated.

The question is also raised as to whether the dissenting Member should sign the despatch or not, and it will be as well that the practice on this point should also be finally settled. Note to rule 25 of Secretariat Instructions (Practice and Procedure, page 105) refers to an Order in Council passed after consideration of a despatch from Lord George Hamilton in 1901, which appears to me to lay down the practice by which we are governed, namely, that important despatches are to be signed "by all those Members who have taken part in the discussion." No exception is made in the case of a dissenting Member, and it is not unreasonable that he should sign in token of his having taken part in the discussion inasmuch as his appended Minute shows his own position clearly. In the

case of the United Provinces *Public A, March 1914, Nos. 83—85. Council despatch* in 1914, to which there were three Minutes of Dissent, all the Members signed the despatch, and I believe that this has heretofore been the accepted practice. I think my Hon'ble Colleague has rather confused the issue by referring throughout his note to "report" instead of "despatch." It is true that in the case of Commission Reports some members do not sign the majority Report at all but make a special report of their own. There can of course be several reports of a commission, but there can be only one despatch of the Government of India, so that the cases are hardly analogous. It may be noted, however, that in the case of Reports of Select Committees, of our own Legislative Council, dissenting Members always sign the report adding a Minute of Dissent.

One other small point remains to be dealt with, *viz*, the concluding paragraph of my Hon'ble Colleague's note with reference to Rule 28 of the Secretariat Instructions. In the first place I cannot agree with my Hon'ble Colleague when he says that "this is certainly not

an exceptionally heavy case." I would suggest that the file which has been circulated is a sufficient answer to his dictum, and that if the weight of the Public Services Commission Report which is involved be added, the volume of papers would undoubtedly speak for themselves. I may add that the mere consideration of my Hon'ble Colleague's note has given me several hours' work. Apart from this, however, I doubt if Rule 28 is intended to deal with a case where a dissenting Minute is involved. It has to be prepared and submitted after the discussion in Council and necessarily involves a material alteration in the original draft—and this apart from any discussions as to procedure which may be entailed.

No. 67.

(I—II.)

QUESTION OF LEGISLATION TO MAKE POST OFFICE
CASH CERTIFICATES NON-TRANSFERABLE.

I.

(13th June 1917.)

I agree generally with Secretary's note. Under the English Bills of Exchange* Act, a promissory note in favour of A. B. is treated as equivalent to one to A. B. or order, and is therefore negotiable. But under Indian law the position is the other way. The certificates under consideration are, I think clearly promissory notes, inasmuch as they do not merely contain an acknowledgment of a debt but embody a promise to pay. They are, however, not negotiable under Indian law. But though not negotiable they may nevertheless be assignable, the difference being that the assignee takes only the rights of the assignor which may be less than those of the holder in due course of a negotiable instrument; in other words the assignee takes subject to all equities which bound his assignor. The only question, I think, is whether the note printed at the head of the certificate to the effect that it is not transferable except with the permission of the Postmaster-General makes it—or rather the rights under it—non-transferable. This provision must, I think, be taken to be a term of the contract between the original purchaser of the certificate and Government, and is apparently intended to preclude assignment. I do not think however, that it is merely in virtue of the agreement between the parties, effective in this direction. Under section 6 of the Transfer of Property Act "property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force." The only provision of the Transfer of Property Act which could possibly have any application is section 6 (d) which makes "an interest in property restricted in its enjoyment to the owner personally" non-transferable. This provision is, I think, intended to apply to quite a different class of matters, such as a leasehold or inalienable tenure, and has never I believe been applied to anything partaking of the nature of a mere money debt. The wording of the clause in itself appears to me to suggest this, as a promise to pay a sum of money to a person could hardly be spoken of as an interest which he enjoys in property. Moreover, section

130 of the same Act which deals with the mode of transfer of actionable claims (and there is no doubt that the certificate embodies an actionable claim) has always been treated as making all claims in action transferable by the procedure laid down in the section. There is nothing in the Indian Securities Act, 1886, which affects the question, and there is so far as I know no other law which touches the point. I think, therefore that if it is desired to make these certificates strictly non-transferable legislation will be necessary.

II.

(29th July 1917)

I AGREE to legislation, but unless the point is considered by Finance Department to be of real importance, I think we should not go beyond making the Certificates non-transferable except with the permission of the Postmaster General. To impose a different condition now would be to vary the contract with the subscribers, and I think that Finance Department should be most scrupulous about keeping to the letter of their bond.

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No. 68.

(I—II.)

BARRING OF POST WAR CLAIMS IN CONNECTION WITH
THE LIQUIDATION OF HOSTILE FIRMS IN INDIA.

I.

(14th June 1917.)

WE ARE not particularly concerned at this stage with the question raised by the India Department of Commerce and Industry Filed papers No. 33—50 Office's communication, but I (Legislative Department Unofficial think Commerce and Industry No. 490 of 1917). should bear in mind that the barring of claims by treaty, and by municipal legislation are rather different matters. The mere fact that the belligerent nations had agreed that all claims should be barred would no doubt be a foundation for municipal legislation, but would not necessarily be the equivalent of it. There may again be claims which are not enforceable in the municipal courts but only diplomatically. I think it may be worth while to call attention to these two aspects of the case, as while the Colonial Office letter of 26th March 1917 seems to deal only with the *treaty* side of the question, the letter to Local Governments is not in terms confined to this aspect of the case.

II.

(21st May 1918.)

WE CLEARLY have not the material upon which to advise except in the most general terms. If the liquidator sold property which he had no power to sell under the Winding-Up Order it seems only reasonable that restitution should be made as soon as possible, and the local Government should consult their legal advisers on the subject. No validating Act could entitle Government to keep the sale proceeds; all it could do perhaps would be to bar an action for damages if the liquidator acted *bonâ fide*. I do not think that a retrospective vesting order is feasible.

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No. 69.

EFFECT OF THE JUDGMENT IN THE MOGUL STEAM SHIP CASE BEARING ON THE QUESTION OF REBATE AGREEMENTS.

(7th July 1917.)

IT CAN hardly be said that the Mogul Steam Ship case decided that rebate agreements are not in the restraint of trade. The Department of Commerce and Industry Merchant Shipping A, Proceedings November 1917, Nos 25—33 (Legislative Department unofficial No. 578 of 1917). only point decided in the case was that, even assuming that such agreements were void, as being in restraint of trade, this did not give third parties a right of action,—the distinction taken being between what is “illegal” (in the sense of indictable) and merely “unenforceable”. As a matter of fact, on the question whether the agreement in the particular case was or was not in restraint of trade, the opinions of the Lords differed somewhat widely. Lord Bramwell and Lord Hannen thought it was; Lord Field and Lord Morris thought it was not; and Lord Halsbury and Lord Watson were content to assume, for the purposes of argument, that it was.

As Secretary, however, correctly points out, the Indian law, as contained in section 27 of the Contract Act, is considerably stricter than the English law, and it is quite likely that such an agreement would be held to be void in India as being one by which, at all events, some of the parties are restrained from exercising their trade. But, however this may be, the effect of such a decision could not go further than holding the agreement to be unenforceable *as between the parties*. It would give no right of action to third parties who were outside the combine. The only way to give *them* a remedy would be definitely to make agreements of this nature indictable and actionable, as has been done in America. But I venture to agree with Commerce and Industry Department in thinking that we cannot afford to legislate hastily on these lines to meet the present complaint.

No. 70.

ORAL AGREEMENTS IN CERTAIN FISHERY LEASES IN
MADRAS.*(7th July 1917.)*

THE MADRAS letter is not very logical, and the annexed opinion of their Advocate General does not help to make their position clearer, but I am not at all sure that there is not a real difficulty underlying their request. They propose to have merely oral agreements for the lease of fisheries where the term does not exceed a year and the rent is less than a hundred rupees. But assuming (as I think we must; see. 20 Cal 446 and 24, Cal. 449) that section 107 of the Transfer of Property Act applies, delivery of possession to the tenant will be necessary. Now I quite agree that in ordinary cases delivery of possession may be made by any form of transfer of control in fact of which the nature of the case admits. But I am not by any means sure that the Courts would apply this doctrine to the case of an incorporeal right like that of a fishery, and it must be remembered that section 107 refers only to immoveable property which does not except by implication as the Courts have held, cover fishery rights. Under English law such a right could only pass by deed; actual delivery such as was recognised in the case of land does not appear to have been recognised in modern times in the case of incorporeal hereditaments such as a fishery. I doubt, therefore, if it would be safe for the Madras Government, which seems to have many cases of these small fishery leases, to rely upon oral agreements *plus* attempted delivery of possessions and this, I think, must be the underlying idea of their Advocate General's opinion, though he does not appear to deal with the points specifically.

If, however, all that Madras propose (as appears from their letter) is to have oral agreements in these cases, the only thing that will be necessary will be a notification under section 107 dispensing with delivery of possession and this should, I think, be put to them as sufficient to meet the case. The notification would of course be confined to cases where the rent agreed upon was less than a hundred rupees.

No. 71.

(I—II.)

TRANSFER OF THE CONVICT ARJUN LAL FROM JAIPUR STATE TO BRITISH CUSTODY.

I.

(12th July 1917.)

IT SEEMS quite clear that Arjun Lal was not tried and sentenced in the ordinary course by a Jaipur Court and that he is at present detained under an executive order of the Maharaja and in effect during His Highness's pleasure. I must also assume that he is a person whose liberty in British India would be prejudicial to our interests. While, therefore, I do not think that we ought to take advantage of any of our powers of detention merely to oblige the Maharaja and in order to carry out in British India the remainder of a sentence of imprisonment imposed by him upon one of his subjects, yet if His Highness chooses to rid himself of the man by pushing him across our border, I think that we should not only be legally entitled to deal with him as an undesirable immigrant, but should be bound to do so in the interests of the State. It might perhaps be sharp practice to induce the Maharaja to do this merely because we are anxious to get him into our custody, but in this case the boot seems to be on the other leg, and the position arises from the Maharaja's desire to get rid of a troublesome convict. I have, however, a very clear recollection that we have already over and over again induced a friendly power on our borders to put people whom we wanted to get hold of over the frontier. This was, I believe, notably what took place between us and Siam in the case of some of the men who were tried and hanged in the recent Burma conspiracy case. It seems, therefore, to be rather late in the day for us to develop squeamishness in such a matter.

Regulation III of 1818 seems to be unnecessarily heavy artillery to employ in such a case, and it may be worth considering whether it might not be better to make use of Section 2 (e) of the Foreigners Ordinance, 1914. If there is any sentimental objection to treating a subject of a Native State as a foreigner though he certainly is one technically for the purposes of this Ordinance) the corresponding powers under the Ingress into India Ordinance 1914, would probably suffice.

Home Department Political A,
Proceedings June 1918, Nos 281—307
and K W

(Legislative Department unofficial
No. 769 of 1917 — Confidential File
No 557).

It is of course for Home Department to make up their minds whether in view of the possibility of further agitation over this man's case, it would be wiser to press the Maharaja to keep him. My note is only written on the supposition that the Maharaja is unwilling to do so and proposes to rid himself of the burden by putting the man over our frontier.

II.

(29th August 1917.)

SECTION 5 of the State Prisoners' Act, 1858, would only seem to apply to prisoners already confined in some jail, etc., in the Presidencies of Madras or Bombay. It would, therefore, I think, be better to act under the State Prisoners' Act of 1850, under Section I of which a warrant of commitment under Regulation III of 1818 may be directed to (in effect) any jail, etc., in the territories of the East India Company. Both Regulation III of 1818 and Act XXXIV of 1850 have been applied to Ajmer-Merwara where, I presume, the transfer of the man to British custody would be made.

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No. 72.

DISPOSAL OF THE G P FUND MONEY OF THE LATE MR. W H SHARP (EFFECT OF SUBSEQUENT WILL MODIFYING FORMER DECLARATION NOMINATING SINGLE BENEFICIARY).

(23rd July 1917.)

I do not think that there is really much difficulty in this particular case, though I agree that it raises questions of some interest from the point of view of the Provident Fund Rules. If the bequest of the Rs. 26,000 and odd standing to the deceased's credit in the Provident Fund to his sister and sister-in-law in equal shares is invalid in law by reason of the previous allocation under the rules of the whole of it to the sister-in-law, she will have to elect either to confirm the provisions of the Will or to dissent from them, and in the latter case will have to relinquish the benefits which she takes under it, and as apparently the latter are the greater, there can be little doubt that she will elect to take the Will

Finance Department Pensions and Gratuities Proceedings C, October 1917, No. 362.
(Legislative Department unofficial No. 623 of 1917)

It is quite clear that Government having notice of the Executors' claim, cannot in any case pay over the Rs. 26,000 to the sister-in-law. Their proper course, in my opinion, is to communicate to her the terms of the "declaration" by the deceased, informing her at the same time of the Executors' claim, and to ask her whether she has any objection to the money being paid over to them. If she agrees, there will be no further difficulty, if she objects and asks that the Rs. 26,000 may be paid to her, the matter will have to go to the Court. Probably the simplest way to have it decided would be for either Government or the Executors to take out an Originating Summons in Bombay for the purpose. I have not the rules of the Bombay High Court before me, but speaking from recollection I think that the Court would have jurisdiction to determine this question by Originating Summons, and that it would be the cheapest course for all concerned. Probably the Court would order the costs to come out of the estate, so that incidentally Government would get a legal decision on the question which has been so much discussed in these notes free of cost! If, however, it is inconvenient for Government to communicate direct with the sister-in-law, who is apparently in England, the Executors might be told that Government can only pay the money over to them if they obtain the consent of the sister-in-law, and that failing her consent the matter must be referred to the High Court, with the

suggestion that they should take out an Originating Summons. The Executors would then probably send the sister-in-law a copy of the Will, and point out to her that it was in any event a question of election, and she would no doubt be advised to consent.

Turning now to the legal question as to the effect of the rules, I agree that they in law constitute a contract, between the depositor and Government. The contract, as I read it, so far as this case is concerned, (and I wish to make it clear that I am only dealing with the particular case and the facts out of which it arises) is that in consideration of the periodical payments made by the depositor, Government will *inter alia* pay a certain sum to him on his retirement from service, or if he dies before retirement or actual payment (leaving no widow or children) pay it to his nominee, provided the nomination is made in a particular way, and failing any such nomination will pay it to his legal representative. Under Rule 20 the depositor is entitled to make a revised nomination which, if made on the prescribed form will be as effective as an original nomination, *i.e.*, Government will be bound under their contract to pay to the new nominee, *pro tanto* administration by Government is evidently considered to be one of the benefits of the scheme which the depositor will only be entitled to the advantage of, provided that he complies with the conditions laid down. But I do not think that the meaning of the rules is more than this. A declaration in the prescribed form is clearly not a final disposition of the depositor's interest, it may be changed from time to time by substituting a new declaration, it may lapse by the death of the nominee, and I think that it may equally be merely revoked. The depositor may quite conceivably wish, if circumstances have changed from what they were at the time he made the nomination, to leave the money (over which, if he is unmarried, he clearly has an absolute power of disposal) to go to his legal representative, giving up the advantage of direct payment by Government to those whom he may desire to benefit, and I can find nothing in the rules which indicates that he is not entitled to do so. Rule 20 does not, I think, mean more than that if he wishes to retain the benefit of direct payment by Government, but to change his nomination, he must do so by a fresh declaration in the prescribed form. So far as the words "desires to revise his declaration" might possibly be thought to include revocation or cancellation, it is obvious that it would take extreme ingenuity to fill up the form in such a way as merely to revoke the previous declaration, and it seems, almost obvious that revocation *pur et simple* was not in the mind of the draftsman of this rule. But though it does not purport to provide for mere revocation, it does not, in my opinion, in any way prohibit it. Indeed, the form of the declaration in itself indicates that it is revocable,

as it deliberately purports to be of a testamentary nature, *i.e.*, it is intended specifically to speak only from death, and all the world knows that testamentary dispositions can be revoked at any time. Having regard to the testamentary form of the declaration, it is, perhaps, doubtful whether mere notice of cancellation would be sufficient having regard to the law as to the revocation of wills, but there can be no doubt whatever that, unless the rules limit the right of revocation, it would be well revoked by a later Will making a different disposition of the property. The effect of the revocation would no doubt be that Government is relieved from the obligation of finding out and paying the depositor's nominee, but this is all.

Secretary suggests that the present question is covered by previous opinions of my predecessor in office, Sir S. P. Sinha, and if I thought this was so I should certainly hesitate greatly before putting forward an opinion of my own at variance with his. But it does not seem to me that there is really any conflict. I have been referred to two opinions of Sir S. P. Sinha on Provident Fund cases. The first is dated 3rd March 1910 and clearly treats only of the power of a depositor *who has a wife and children* to deal with a Provident Fund deposit by Will, and the view taken is that he cannot, but this does not affect the present case. It may well be that the contract by the rules is that in consideration of the payment by the depositor Government will, if he leaves a wife and children, pay the ultimate amount of the deposit to them, and that the depositor's power over the Fund under these conditions is limited to a power of appointment among the particular class of beneficiaries. The second opinion is, dated the 29th April 1910, and the question there under consideration was whether a nomination by a Mohammedan depositor which was contrary to the Mohammedan Law of Inheritance would be valid. A Mohammedan under his personal law can only dispose of one-third of his property by Will and (speaking generally) bequests to persons who are heirs in excess of their legal shares are invalid and the only question under consideration was whether a nomination under the rules was or was not outside his personal law of the depositor. My Hon'ble predecessor was apparently of opinion that a disposition in the form prescribed by the rules was altogether outside the Mohammedan Law, though I am not sure whether he had the actual form before him, or considered the case from the point of view of its being a *testamentary* declaration. But however, this may be, he was not considering the question whether a nomination by an unmarried depositor could be cancelled or revoked, and I do not think that the mere fact that he has made use of the expression "the employé cannot make a Will with reference to his share in the Fund" should be taken as having any application to

a state of facts altogether different from that which he was considering. Moreover, that Sir S. P. Sinha did not intend to use these words in the wide sense of which they are no doubt capable, seems to me to be clear from his reference to the money passing "in the absence of the specified persons" to the legal representative of the depositor, which would of course include an executor.

I only wish to add that where the Government Solicitor has been consulted I do not think that we should be asked whether his advice ought to be followed. Any further reference in such a case should obviously be to the Advocate General.

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No. 73.

QUESTION WHETHER AN ENTRY IN THE SHEET ROLL OF ANY INDIAN SOLDIER DYING ON ACTIVE SERVICE CAN BE TREATED AS A VALID WILL.

(1st August, 1917.)

As I read the Army Department's proposal it is that an entry in the sheet roll of any Indian soldier dying on active service shall have the legal effect of a will made by him and shall require no proof.

Legislative Department unofficial
No 645 of 1917.

If this is what is intended (and the Army Department will no doubt forgive me if I have misunderstood them) it can of course be so provided by legislation, but the proposal is entirely without precedent and I doubt if the difficulties in the way of such a cutting of the Gordian knot of administration have been appreciated. To take a very simple case, *viz.*, that of a Mahomedan soldier dying on active service. By his personal law he can only dispose by will of a third of his property. the remaining two-thirds are divisible amongst his legal heirs. The present proposal would in effect entirely override the Mahomedan law and would enable him in effect to dispose of the whole by will. The Army Department probably know what a very sacred thing the Mahomedan law is, and I cannot think that they would wish to override it by legislation of this sort. Then take the actual case out of which this reference has arisen, *viz.*, that of a Hindu who has left two sons, one a major apparently and one a minor, and a widow, and who has nominated the major son as his heir, would it be desirable that such a nomination should in law deprive the minor son of all share in the estate and the widow of her legal right of maintenance? So long as such a nomination is made only to indicate the person to whom the soldier desires, the petty effects which he has with him to be made over in the event of his death, the position is reasonable enough, but if such a nomination is to be treated as an indefeasible will great difficulties will be encountered. All sorts of other questions would also arise for consideration. If the sheet roll is to be treated in effect as a will, will it be superseded by a later will? Indian soldiers who are subject to the Indian Succession Act can when on active service make an oral will, so can most Hindu and Mahomedan soldiers, and a sheet roll will could hardly prevail against a subsequent valid testamentary disposition. Again under the ordinary law a man must be of full age before he can make a will, is it intended to disregard this salutary provision which is of almost universal application and to give legal validity to a minor's will

if made by his sheet roll ? I notice also that the sheet roll provides for the nomination of a person to whom the estate should be made over on behalf of the "heir"; this I presume would ordinarily be the Commanding Officer, and following the analogy of the will, I imagine that the intention would be that he should be the executor. If this is what is intended, it must be borne in mind that this person would be saddled with all the worries of administration, payment of debts, etc., and this would be practically impossible in the case of a man's Commanding Officer on active service. The real fact is that the army authorities have been led by Mr. Thekoredas Parekh into the belief that legislation of this nature is a very simple matter and will get rid of all difficulties, whereas it really involves all sorts of complicated questions and would require very careful thinking out. If I have not misread what the Army Department intend, I would venture to suggest that the proposals should be reconsidered.

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No. 74.

(I—II)

QUESTION WHETHER CIVILIAN ENEMY SUBJECTS INTERNED IN INDIA ARE PRISONERS OF WAR WITHIN ARTICLE 4 OF THE HAGUE REGULATIONS.

I.

(2nd August, 1917.)

I HAVE detained this file as it raises a point of considerable interest and some difficulty, though the actual question to be decided is a petty one. The point to which I have referred is whether enemy subjects resident in the country, whom it has been found necessary to intern, thereby become prisoners of war within Article 4 of the Hague Regulations, to which Judge Advocate General has referred, and I must confess that I am not prepared to subscribe to his view. Reading the whole of Chapter II of these Regulations I feel no doubt that it is only dealing with members of the armed forces of the enemy whether "combatant or non-combatant" (*vide* Article 3) who have been made the subject of capture. If this is the correct view there is no difficulty about the meaning of arms in Article 4: it would clearly cover any weapons of offence or defence which were in the possession of the captives, and if they were armed with shot guns they would clearly be liable to confiscation. But in my opinion this article has nothing whatever to do with civilian enemy subjects subjected for political reasons to restraint in the country where they happened to be when the war broke out. No doubt in old days the practice was to make them prisoners of war: see Oppenheim's International Law, Volume II S. 100: but this practice has long been abandoned, and I feel little doubt that we must not have the restrictive measures which we have been forced to adopt against civilian residents of enemy nationality or sympathies on the old doctrine of our right to make them "prisoners of war." In the first place it must be remembered that the action we have taken has been in accordance with our Municipal Law and that it was only under the authority of specific legislation that any persons were interned while no powers have been deemed necessary for the detention of the large number of "prisoners of war," rightly so called, who are now located in different parts of India. In the second place it must also be remembered that we have taken similar action against persons who though our own subjects in the legal sense of the term, are suspected of enemy sympathies. Our action therefore against all such persons has not been based upon any theory

of their being prisoners of war, but merely upon our general right of making laws for all persons in India and of taking whatever precautions we deem necessary for the protection of the State. But though we have legislated for the restriction of the liberty of such persons, we have not taken power to confiscate any of their property and indeed have most carefully avoided anything of this sort throughout, as being contrary to the generally accepted principles of modern international law. I also notice that under section 22 of the English "Aliens Restriction (Consolidation) Order 1914," though power is taken to "seize" any arms found in the possession of an alien enemy there is no suggestion of confiscation, the power to seize being only based on the contravention of a legal prohibition against possession.

On the whole therefore I feel little doubt that the fire arms to which these papers relate must be treated as the private property of enemy subjects and are not liable to confiscation, unless within some provision of our municipal law. It seems clear that they are not within the confiscatory powers of the Arms Act, and the only way therefore that they can be dealt with is under section 7 of the Enemy Trading Act 1916. This Act was no doubt intended to deal with rather a different class of property, but the words of the section would certainly allow of their application to these fire-arms. I should have thought however that it would have been sufficient merely to keep them; very simple precautions would prevent their being altogether spoilt, and after all the loss would not be ours but that of the owners.

I should under ordinary circumstances have been content merely to endorse Secretary's note with which I am in complete agreement, but there seems to be some general confusion as the position of interned enemy subjects, who are frequently spoken of as "prisoners of war" and I think that the point needed clearing up. For instance in the paper under consideration one of the Germans referred to is spoken of as "interned in India as prisoners of war" though really I presume interned under the Foreigners Ordinance, 1914. I also notice that there is nothing in this letter to suggest that the other two Germans concerned were even interned at all. If they were merely repatriated as the letter suggests there could hardly be any question of their having been "prisoners of war" in any possible sense.

II.

(9th October, 1917)

My previous note on this subject was written on the assumption that the foreigners then concerned were interned under the

Municipal law of India, viz, the powers granted by the Indian Legislature under "The Foreigners' Ordinance, III of 1914." This Ordinance, which has since been confirmed by Act I of 1915, was and is just as much part of the municipal law of India as the Penal Code, or any other Act of the Indian Legislature and if the internments in question were carried out under the powers so granted I think that my previous opinion was right, and that the internees are not prisoners of war in the technical acceptance of that term. If however I was wrong in my assumption, and the persons in question were seized and imprisoned without any legislative sanction, and merely as an Act of State, then I agree with Colonel Caruana that they are prisoners of war and should be treated as such. The question therefore resolves itself into one of fact, and it may be that the facts will require to be elucidated in each case.

I was perhaps not justified in my assumption that all internments were carried out under the provisions of Ordinance III of 1914, as some persons may have been interned prior to the 20th August 1914, when Ordinance III of 1914 came into operation, and their internment may not have been subsequently regularised by an order under the Ordinance. It was, however, not unreasonable to assume that all internments by the Military authorities after 20th August 1914 were under the Ordinance. No order in writing seems to have been required and our powers under section 3 were delegated widely to the local Military authorities all over India (see the Notification of 22nd August 1914, cited at pages 325-6 of "Legislation and Orders relating to the War.")

The English case referred to by Colonel Caruana (see Law Times, Volume 113, page 971) is direct authority for the proposition that enemy subjects interned merely by executive orders after the declaration of war, are prisoners of war, but does not touch the case of persons so interned under legislative enactment. It is quite clear from both the judgments reported that the act of internment in that case was not justified under any of the emergency statutes passed since the commencement of the war, and was merely an executive act outside the law and thus, in my opinion, is what makes all the difference.

If the point is considered to be of importance I think that it should be referred to the Secretary of State and he may think it desirable to take the opinion of the law officer at Home upon it. It may well be that a large question of international law is involved, upon which action in India should be taken upon approved lines. I shall be glad to discuss the question with Colonel Caruana if the Army Department think the matter of importance.

No. 75.

PROPOSED CONVENTION BETWEEN THE GOVERNMENT
OF MADRAS AND THE FRENCH COLONY OF KARIKAL
REGARDING IRRIGATION BY THE WATERS OF THE
KAUVERY.

(13th August, 1917)

IF we choose to make an agreement with Mysore, (and this is, of course, what the position amounts to) it cannot in any way prejudice French interests, and we must undertake to settle with France I agree with Secretary that it is undesirable to allow the French Government to enter into any sort of negotiations with Madras or Mysore. Any complaint the French have to make must be settled by the Government of India. There will be no real difficulty, as the amount of water passed on from Mysore will be ample to ensure the full quantity to the French settlement. Of course Madras may lose by this if the arbitrator has not in fact made sufficient provision for both, but I do not think that this consideration should be allowed to complicate the question of the binding character of the award. The point as I understand it, is not whether the award is a good one or a bad one, but merely whether Madras is bound by it.

No. 76.

ASSIGNMENT OF PROVIDENT FUND MONEY (CASE OF MR A J. MOON).

(20th August, 1917.)

I PROPOSE first to deal with the general situation, and then Finance Department Proceedings with the particular rules which Pensions and Gratuities A, March 1914, have been referred to in connection with the Moon case. Nos. 12—13.
(Legislative Department unofficial No. 695 of 1917.)

Apart from any statutory validity given to the rules by Act IX of 1897, they merely constitute a contract between Government and the depositor—the interest of the depositor in the fund is, under the contract, one that only matures in favour of him personally on his retirement—until then he has only a contingent interest in a future sum—but it is none the less transferable under the ordinary law (see section 6 of the Transfer of Property Act, IV of 1882) and Government as the deposittee and eventual debtor is under the ordinary law (see chapter VIII of the last mentioned Act) bound by notice of any valid transfer just as much as a private deposittee would be. The supervention, however, of the Provident Funds Act of 1897 complicates the position, as it validates the rules to a certain extent, but to a certain extent only, and so far as it does not do so the ordinary law still applies.

The material provisions of the Act from this point of view are sections 3 and 4 which—

- (1) deal with provident fund interests not exceeding Rs. 2,000 in value, standing to the credit of a deceased depositor, and give certain definite powers with regard to their distribution, but only in the event of the depositor's death :
- (2) provide that no compulsory deposits shall be liable to attachment or shall pass on insolvency to the Official Assignee :
- (3) validate provisions made by the rules for the widow and children of the depositor but here again only in case of his death.

The Act does not however either directly or by implication invalidate any assignment of the depositor's interest which is not inconsistent with the provisions above referred to, leaving both its

validity and effect to be decided by the ordinary law. According to the rules when a man retires from service his interest in the fund becomes his absolute property subject however to an apparent condition that if he dies before it is handed over, it is to go to his widow and children. Apart therefore from case coming under this exception which I will consider later on, any assignment which the depositor may have made of this interest is, I think, valid in law and becomes effective in favour of the assignee upon the depositor completing his period of service. In my opinion it is equally valid whether in fact made before or after retirement, and to this extent I think that the judgment of Macleod J. was defective, though of course he was only dealing with the case of a transfer made after retirement and was not concerned with the other cases, so that what he said with reference to it was merely *obiter*. If therefore Government have notice of any assignment of a depositor's interest, duly made in accordance with the provisions of section 120 of the Transfer of Property Act, they are bound on the depositor's retirement (when they become in fact his debtor) to act upon it as much as any other debtor would be. The main object of the rules and the Act is, I think, clearly to ensure provision being made *in the event of the depositor's death during service* for his widow and children. Once he has retired the money is his own and Government has no further interest in it. he may (as Mr. Parsons says) either gamble the whole of it away the day after he gets it, or may utilise it for the benefits of his family. No assignment of his interest in the fund will take effect or bind Government in any way, if he dies before retirement; but it will take effect and will bind Government in my view, if he lives to complete his service.

Turning to the rules, which Sir R. A. Gamble suggests require amendment the material considerations seem to be as follows —

- (1) The words in rule 10 (1) "and be handed over to him unconditionally" are perhaps not very happy, but they are, I think, only intended to apply as between the depositor and Government, and to emphasise the fact that the depositor's right to the money is *as against Government* absolute. This however would seem to be made sufficiently plain by the preceding words "become his absolute property," and the words in question can, I think, be omitted without in any way altering the terms of the contract. Unless there is some real objection to their omission, I think that it would be wise. If however this is thought undesirable, it should be made clear by a note that the words are

only intended to apply as between the depositor and Government, and do not affect any right which a third party may have acquired by assignment from the depositor

- (2) The words in rule 10 (2) and (2) (a), providing that "in the event of an officer's death... .. *after retirement, but before the money has been handed over,*" his interest in the fund shall go to his widow and children, seem to me to be inconsistent with rule 10 (1) by which the money becomes his absolute property on retirement. If it has become "his absolute property," it must, whether actually paid to him or not, pass on his death as part of his estate, and not by the special form of devolution provided by rule 10 (2) (a). At the same time, the provisions of rule 10 (2) (a), being in favour of the widow and children, would [at all events apart from the words of rule 10 (1)] be within section 4 (2) of the Act of 1897, and would thus override the ordinary law. If therefore it is desired to retain the words italicised above, I think that rule 10 (1) requires further modification in order to get rid of the inconsistency I have referred to. Probably the simplest way of doing this would be to substitute in rule 10 (1) for the words "and be handed over to him unconditionally" the words "subject only to the provisions of sub-rule (2)."

Personally however I should advise the omission from rule 10 (2) of the words "or after retirement but before the money has been handed over," as I think they in any case create an anomaly in rules the basis of which is only to provide a special method of devolution in the event of a depositor dying before retirement, and in case of his serving his time out to leave him free to dispose of his fund-moneys as he likes. The retention of these words is also likely to cause practical difficulties in the case of an assignment by a depositor, which matures in favour of his assignee by the depositor's retirement, but which might apparently be defeated by mere delay in payment to the assignee by Government until the depositor dies. In such a case probably the courts would hold that the right of the assignee to the money was complete, and that it ousted any claim of the widow and children under rule 10 (2). The question would however be a difficult one upon which there might well be conflicting rulings.

- (3) Rule 10 (3) (a) again gives rise to undoubted difficulty. I think that what is intended by this rule is that Govern-

ment will not be bound by or recognise any assignment or encumbrance which purports to override or affect the interest of the widow and children in the event of the depositor dying before retirement. If this is all that is intended, the wording of the rule is obviously too wide and should, I think, be restricted as above. So far as the rules (as expressing the contract between the depositor and Government) make provision for the widow and children, they are validated by the 1897 Act and the ordinary law is displaced; but, as already stated, any dealings by the depositor with his interest in the fund, which do not infringe their right, are left untouched, and if valid under the ordinary law Government cannot refuse to recognise them.

It is not necessary for me to deal specifically with the case of wills. I have had to consider C, Pensions, October 1917, No 562, one aspect of this in a recent file and I have no desire to go over any of the same ground again. It will be sufficient for the purposes of this case that so far as concerns a depositor's interest in the fund which matures by his retirement he has the same power of disposition by will as he has over any other part of his general estate.

No. 77.

GRANTING OF *SOLATIUM* IN THE CASE OF ACQUISITION
OF LAND

(29th September 1917.)

Mr Rowland's¹ very careful summary* of the English legislation gives Revenue and Agriculture Department the information they ask, with regard to "safeguard". I think that this had better stand over for consideration later. As at present advised I am not prepared to agree, to the abolition of the "15 per cent *solatium*", though I think that it may be worth consideration whether it should not be reduced to 10 per cent. and whether there should not be power to refuse it in particular cases. All that recent legislation at home suggests is that no *solatium* is allowed in the case of acquisitions for local improvements, mainly in rural areas where the large landowners have failed to do their duty by the people who live on the land. I cannot conceive that this principle is applicable to (say) the case of Government taking up land in Simla to provide residences for its own employees, or to such a case as the acquisition of land on the Poona Ghats for the establishment of a power station to supply Bombay. It will no doubt be understood that it would be impossible to amend the Land Acquisition Act merely to deal with this question, and that it could only be taken up when a general revision of the Act is undertaken. I have suggested certain blue pencil alterations of the draft to make it less committal, and I hope that Revenue and Agriculture will see their way to accept them.

Department of Revenue and Agriculture, Land Revenue Proceedings A, March 1918, No. 28.
(Legislative Department unofficial No. 830 of 1917).
*Enclosure to Pro. No. 28.

¹Attaché in the Legislative Department.

No. 78.

LIMIT OF TERRITORIAL WATERS

(11th October 1917)

Foreign and Political Department
 Proceedings Internal B, January 1918,
 Nos 387—389.

(Legislative Department unofficial
 No. 885 of 1917).

I also have no doubt as to
 the correctness of Secretary's
 answer to the question pro-
 pounded

I feel some interest in the question as to whether the usual territorial limit of 3 miles can be reckoned seawards from a mere rock only visible at low tide, a proposition which seems to me to be extremely doubtful. The only case so far as I can discover in which this question has been considered is an old Admiralty case of 1805 reported under the name "The Anna" in the 5th Volume of Christopher Robinson's reports at page 385c. The question there was whether an enemy ship which had been captured off the coast of America was at the time within the protection of American territorial waters. The *locus in quo* was the mouth of the Mississippi River, and the American Government claimed to reckon the 3 miles from certain small islands formed by alluvial deposits carried down by the river. Sir William Scott, before whom the case came, accepted this contention holding that these islands, though uninhabited were part of the territory of America. They were, however, clearly always above sea level and were resorted to for shooting and taking birds' nests, and it seems to me to be a considerable jump from this decision to hold that a mere point of rock, only emerging from the sea at low tide, is part of the territory of the nearest Native State. The origin of the 3-mile limit is supposed to be the range of effective protection by gun fire, and would therefore pre-suppose that the land from which it was to be measured was at least capable of fortification—a theory which would clearly be inapplicable to a rock like the Kalyan Kada. If a light-house were built on a sunken reef out at sea I doubt if this could be held to give a new starting point for territorial jurisdiction at all events without an effective occupation of the reef as an accession of territory. It is also perhaps material to refer to the Territorial Waters' Jurisdiction Act, 1878 (41 and 42 Vict, c. 73), which applies to India. Section 7 of this Act makes the limit of territorial waters for the purposes of the Act a marine league from "the coast" measured from low water mark, and I doubt if an isolated rock, apparently nearly three miles from the actual shore, could be considered as part of the "coast". Questions as to the limit

of territorial waters are, however, always difficult ones, as there is by no means a general consensus of international opinion about the 3-mile limit, and we have ourselves in past time for fiscal purposes claimed jurisdiction beyond the 3-miles. see what are known as the Hovering Acts (9 Geo. III c. 35 and 24 Geo. III. c.

**Cf.*, 16 and 17 Vict, c. 10, s. 212. 47*) since repealed. But it would, I think, be a sound rule in dealing with claims of Native States to accept the limitation laid down in the Territorial Waters Jurisdiction Act above referred to.

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No. 79.

PROPOSAL TO BRING "MISJOINDERS" UNDER THE
PURVIEW OF SECTION 537 OF THE CODE OF CRIMINAL
PROCEDURE.*(26th October 1917.)*

I AGREE generally with Secretary I am against the proposal to bring "misjoinders" (so Legislative Department unofficial called) within the purview of No 895 of 1917. section 537¹. It is not of course really a case of "misjoinder", but of the trial of a larger number of offences at the same time than the law allows. I have no doubt that in nine cases out of ten this would seriously prejudice the accused, and that it would be unsafe to leave it to the courts to determine whether or no the illegality has caused a failure of justice. I feel sure that any advocate who had practised at all extensively in criminal courts would agree with this view, and it would probably be pressed upon us in Council.

¹ The Code of Criminal Procedure, 1898.

No 80

(I—III.)

PROPOSED ORDINANCE TO CONTROL THE MAXIMUM
PRICE OF CERTAIN ARTICLES OF COMMERCE.

I.

(1st November, 1917)

THE QUESTION of maximum prices seems to have been germinating in the Munitions Board since Department of Commerce and Industry Proceedings Internal Trade, A., April last, and it is a little hard that a big proposal for legislation should be thrown at our heads under an "urgent" ship just when we are moving to Delhi. It is only a chance that I am here at all at the moment.

I cannot think that in any case such a subject as this, is within the legitimate scope of an ordinance. The needs of the war I know, and am prepared to deal with by rules under the Defence of India Act, but I am unable to understand how an emergency, unconnected with the war, has suddenly come into existence since the recent session of the Legislative Council. I also have grave doubts whether the Munitions Board's proposals, apart from the necessities of the war, are required for "the peace and good governance of British India." They may be very desirable in the interests of the various trades concerned, but that is, I venture to think, hardly sufficient.

So far as war needs go, anything that is required can be effectively provided for by Rule. If the existing provisions for fixing compensation are inadequate—though in the case of all recent rules it is to be fixed by a Government expert, which appears to be going some way towards merely leaving the matter in the hands of Government—we can no doubt modify them. But if it is desired frankly to be able to regulate prices in India generally, altogether apart from war needs of course legislation will be necessary. I can, however, hardly conceive that this is a policy to be embarked upon under cover of an urgent ship. Yet it seems to be what Sir Thomas Holland intends. Under the head "Cement" for instance he complains that unreasonable prices are being charged to local authorities, and he apparently wishes to be able to fix the price at which cement is to be sold to them. Under the Head "Coal and Coke" too, the suggestion is not so much that war industries in Bombay are being held up for want of coal (a position which could legitimately be dealt with under the Defence of India Act) but apparently that the general public is being victimized. Personally I thought that one of the objects of setting up a Committee to control the

supply of wagons was to prevent coal going to speculators altogether, and to see that it was only supplied to actual consumers. If I am correct in my recollection on this point, it would seem that the Committee has not been altogether successful, but this would hardly be sufficient justification for the present drastic proposals.

The suggestion I notice is to schedule only special commodities at first, but to take an unlimited power to add to the list, which would obviously enable Government to control prices of every commercial product and manufacture in India—a socialistic possibility which we should find it somewhat difficult to defend apart from the needs of the war. If, however, anything of the kind is to be done it ought, in my opinion, to be done by legislation in the ordinary course, and not hurried through by Ordinance without submission to the Legislative Council. Council legislation would have to follow next session in any case however “cumbrous” the procedure may seem. But the question of policy is such a far-reaching one that it must be definitely settled before this Department can be asked to consider any question of drafting

II.

(25th June 1918)

THE standardised cloth referred to is presumably to meet the requirements of the poorest classes. It can only be to provide for their necessities that action under the Defence of India Act will be possible. The difficulty in this case will not be in making the rules but in working them. If control of the manufacture of cloth generally is required, legislation in Council will have to be undertaken. Commerce and Industry Department should clear this point up.

III.

(3rd July 1918)

IF THE Home Member agrees that the difficulty of buying cotton cloth is likely to lead to riots and internal disturbances, I think we ought to deal with the situation by rules under the Defence of India Act as suggested in this file, but only so far as to control the classes of cloth used by the poor. I should be very unwilling to attempt to control the better kinds of cloth in any way. It seems to be of importance to ascertain if there is likely to be shortage of raw cotton—not merely at the moment, but during the continuance of the war. If we sell all our surplus of this year's crop and there is the failure of the crop in the coming season, we shall be in serious straits. These considerations seem to me to have a considerable bearing upon the question of a cotton export duty which is discussed on another file.

No. 81.

(I—II.)

SUPPLY OF WARM CLOTHING, ETC., TO LASCAR SIN SEA-GOING VESSELS.

APPLICATION OR OTHERWISE OF THE ENGLISH MERCHANT SHIPPING LAW TO VESSELS NOT REGISTERED IN THE UNITED KINGDOM.

I.

(10th November 1917)

Department of Commerce and Industry
 Proceedings Merchant Shipping
 A, September 1918, Nos. 1—9.

(Legislative Department unofficial
 No. 952 of 1917.)

I AGREE on both the points
 referred to above.

Section 27 of the Act of 1883 is not very clearly worded, but the effect of it is, I think, that items (a) to (g) of sub-section (1) are to be statutory terms of every agreement, and provisions as to advance of wages, supply of warm clothing and other lawful stipulations are optional. The *form* of the agreement is to be sanctioned by the Governor-General in Council, but there is no power given to him to prescribe additional compulsory terms: all he can do is to see that there is room on the form for their addition.

I think that the question of heating stands on the same footing as warm clothing.

II.

(7th August 1918)

The question put to us, as appears from Commander Hickman's letter, is whether surveyors surveying ships in Bombay have power to enforce the accommodation provisions laid down by section 261 of the Merchant Shipping Act, 1894, which are considerably more liberal as regards crew spaces than those of section 70 of our Act of 1859 as modified by Act XIII of 1876.

The answer, as it seems to me, in the case of sea-going ships not registered in the United Kingdom, must be in the negative, since section 261 (d) provides that in such cases, where the ship is within the Indian jurisdiction, these accommodation provisions shall not apply.

No doubt the result is a hopelessly anomalous one as the moment the ship leaves Indian jurisdiction, *i.e.*, goes beyond the three-mile limit, the requirements of section 210 of the English Act become imperative, and non-compliance with them constitutes an offence for which the shipowner is liable under the section. It may be that on the return of the ship to Bombay, or at its port of destination if in a British possession, an owner who had refused compliance with the provisions of section 210 could be prosecuted thereunder section 686 of the Act, and this possibility might be pointed out to recalcitrant owners by the Bombay surveyors. As the law stands, however, they cannot, in my opinion, directly enforce the provisions of the English Act in the case of ships not registered in the United Kingdom.

In the case of ships registered in the United Kingdom, the law would seem to be otherwise, and surveyors in India should apparently insist on the English rule being observed; see *Peninsular and Oriental Steam Navigation Company v. The King*, 1901, 2, K. B. 686, where Mathew, *J.*, held that in respect of such ships the provisions of the English Statute must be taken to override those of the Indian Act. The judge was of opinion that in the case of all such ships our Act was in direct conflict with the English Statute. He did not, however, deal with the case of ships registered out of the United Kingdom, and section 261 of the Act was not referred to.

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No. 82.

REJECTION OF THE CLAIM OF THAKUR GOPAL SINGH TO SUCCEED TO THE ENTIRE THIKANA OF CHAWKRI IN THE JAIPUR STATE CRITICISM BY SIR ELLIOT COLVIN, AGENT TO THE GOVERNOR-GENERAL IN RAJPUTANA, OF THE ATTITUDE ADOPTED BY HIS HIGHNESS THE MAHARAJA OF JAIPUR IN THE CASE.

(19th November 1917)

Foreign and Political Department
Proceedings Internal B., January 1918,
Nos 175—178
(Direct reference.)

Judged by purely legal standards, and apart from the respect due to any considered opinion of Sir Elliot Colvin, this case does not really present any very great difficulty.

A reference to arbitration and an award constitute in law a contract between the parties in the terms of the award, and therefore as between the four brothers all the conditions of the award referred to in the case were no doubt binding. The main provision of the award was apparently a partition of the family estate upon certain lines, but it contained a clause to the effect that none of the brothers or their widows should adopt any one but a brother's son, and that if any brother died sonless his share should in effect go to the Tikai or head of the family. The clause is very obscurely worded, but I take this construction as the one put forward by the petitioner Gopal Singh (see Enclosure 1, to Proceedings Nos. 177, passage marked A) and as obviously the most favourable to his case. A private agreement that the property should devolve in this way would, however, as I understand, be ineffective according to the law of the State, and could only be validated by the sanction of the Maharaja whose prerogative right it is to decide questions of succession in the case of estates of this nature where there is no direct male heir. This term of the award, therefore, though possibly valid for what it was worth as between the brothers, would obviously not affect the inherent rights of the Maharaja, who was no party to the arrangement unless he in some way subsequently assented to it, and the only question in the case is whether it is clear that he had done so. I put the issue in this form as I understand that there would be no ground for interference by the Government of India unless this question could be answered in the affirmative.

The case for Thakur Gopal Singh is that the Maharaja did in fact assent to this particular clause of the award by his order of 11th

October 1901, which in effect confirmed the decision of the State Revenue Court dated 7th May 1901. It is, therefore, necessary to see exactly what this decision was and under what circumstances it was given. It seems that after the death of Mangal Singh, the father of the four brothers, a dispute arose as to the succession, and the State having a claim against the whole Thikana for revenue attached the property, and it appears to have remained under attachment for seven years. This case (referred to in the papers as the Matmi case) was eventually dealt with by the Revenue Commissioners in January 1900 and an order was passed by them that the Matmi dues should be realized from all four brothers and the Thikana released. Their decision eventually went up to the Maharaja for confirmation, and he held that having regard to the disputes between the brothers it would be useless to release the estate without settling what their individual interests in it were, and he referred it back for this purpose. Thereupon the case came on again before the Revenue Court, not as before merely as a case between the State and the family as a whole, but as a case between the four brothers to ascertain their respective rights. The agreement of reference and the award were pleaded by three of the brothers as entitling them to a formal partition. Gopal Singh, however, held out and claimed the whole, but (as it seems) studiously avoided appearing before the court until the hearing was practically over. Two specific issues were raised, namely, (1) whether the custom of the tenure was partition or descent by primogeniture; and (2) whether partition should be made according to the award. The Court found formally on both these issues; on (1) that partition would be in accordance with customs, and on (2) that there was no reason why the arbitration award should not be accepted and that partition should be decreed in terms of it. Their decision then went up to the Council and from it to the Maharaja who accepted "the proceedings" and ordered them to be put in force.

It seems, however, obvious from this short resumé of the case that what the State was primarily concerned with was merely the payment of revenue, but that incidentally it was thought desirable to ascertain what were the interests of the four brothers *inter se* in order that the proper share of the revenue might be levied from each. There was no reference throughout the proceedings to rights of succession on death or to adoption; the case proceeded strictly and properly on the two particular issues raised and no other question was discussed. The only peg upon which it is possible to hang an argument that the question of succession as between the brothers and the Maharaja was covered by the Court's decision is a sentence which occurs in the judgment to the following effect.

"It is also incumbent on the parties to abide by the other conditions laid down in the award and which it is not necessary to repeat in this decision." It is upon this sentence that Sir Elliot Colvin lays particular stress, and he says of it, "It would seem difficult for the courts to have expressed themselves with more precision in regard to the bearing and general acceptability of the award." I must confess that this seems to me rather a strong assertion to make. The sentence in question occurs at the end of a detailed recital of the terms of the partition and before the objections of Gopal Singh are dealt with, and it appears to mean no more than that there were other terms in the award which were equally binding between the parties but which were not material to the only issue then under consideration, namely, whether the allocation of particular villages to the particular shares should be upheld. Not only was no issue formulated as to the question of succession after the death of a sharer, but the attention of the Court was evidently not drawn to the point in any way; there was no discussion as to the necessity of the Maharaja's sanction to the arrangement nor was it ever asked for as the parties evidently thought that it was not required, and when the case came up to the Maharaja there was nothing even remotely to suggest to him that he was being asked to sign away his prerogative rights.

Under these circumstances, it seems difficult to understand upon what grounds it could be argued at all that the Maharaja had assented to this particular clause of the agreement in the sense of sanctioning an arrangement which was invalid without such sanction. It may fairly be suggested that in confirming the decree of the Revenue Court he was acting only in his judicial capacity and not in his capacity of sovereign; and that giving the fullest effect possible to the sentence quoted from the Revenue Court's judgment above, all that the Maharaja did was to confirm this particular clause of the award *as between the brothers*, his assent to it not being apparently considered necessary and certainly not being asked. But even if these may be thought technical objections (though I am not at all sure that they are), the fact remains that there was admittedly no express assent by the Maharaja, and the only possible ground in law upon which the case for Gopal Singh could be based would be estoppel, the argument being that by confirming the decision of the Revenue Court he had led Gopal Singh to believe that the clause as to succession had his sanction; and this is, I think, the ground on which Sir Elliot Colvin rests his opinion.

Estoppel, however, is a very dangerous basis for any layman's decision, and I doubt if Sir Elliot Colvin quite realized the limitations of it. The doctrine is a purely equitable one, well-known both

to English and Indian law, and there are two essentials of its applicability which are obviously wanting in the present case. The first is that the representation made (in this case by the confirmation of the Revenue Court's decision) must have been made "wilfully" (*Pickard v. Sears*, 6 A. and E., 475), or as section 115 of the Indian Evidence Act puts it "intentionally", *i e.*, intending it to be acted upon by the other party; and the second that the other party must have acted upon the faith of it to his detriment. Now, in the present case the Maharaja has declared that he never intended to make any representation as to his sanction, and Sir Elliot Colvin accepts this as true and admittedly Gopal Singh has never acted in any way to his detriment upon the alleged representation. It was not as if the courts' decision was not binding upon him, but was accepted by him on the faith of the Maharaja's sanction to the succession clause. The decree was finally binding upon him, and he merely sat down under it because he could not help himself in any way. There was, therefore, to my mind clearly no estoppel and if the case is to be dealt with on either legal or equitable considerations, Gopal Singh in my opinion has no case.

If, therefore, I am right in assuming that the Government of India could only interfere in this case if it was clear that the Maharaja had in 1901 assented to Gopal Singh's right of succession, I am very definitely of opinion that this has not been established. It seems to be suggested in the notes that the Maharaja's disposition of the estates of Sheonath Singh and Ganpat Singh was the result of corruption, and this may no doubt have influenced Sir Elliot Colvin's attitude towards the present claim, but there is nothing in the papers submitted to me which would justify my basing any conclusions upon this suggestion.

No. 83.

INTERPRETATION OF THE TERM "FINDER" UNDER
THE INDIAN TREASURE TROVE ACT, 1878.*(26th November 1917)*

THIS is a memorial to the Government of India in which it is claimed that a decision of the Collector under Section 7 of the Indian Treasure Trove Act, 1878, was wrong. The decision is admittedly final under Section 17 of the Act, and there does not seem to be any chance of a claim being made against the Government by the memorialist in the courts. I do not think therefore that the case is carried by rule 17(e) of the rules of Business. It may be that it comes under Rule 17 (g), but this is a rule which we have recently honoured more in the breach than the observance, and I think that when the case arises directly after a memorial to the Government of India, and at all events involves a question of construction under one of our Acts, we ought not to be astute to throw it out.

I have read the papers, and think that the decision of the Collector on the facts was right. The memorialist was clearly acting throughout in his capacity of Tahsildar with the aid of the police and the village officials, and it seems clear that apart from this aid and the information which he had received in his official capacity, he would never have made the "find" at all. He admits that he employed men to dig for him, and it is not disputed that they were paid out of Government funds. If the diggers whose actual hands turned up the vessels were not the "finders" within the meaning of the Act on the ground that they were merely servants or employees, it would seem to be obviously inconsistent not to apply the same reasoning to the Tahsildar himself who clearly employed them on behalf of Government. The Tahsildar was in fact only a middleman between his employees and his employer and I cannot see how under the circumstances he could have been held to be individually the "finder".

Whether the reward granted to the memorialist was sufficiently liberal or not, I must of course leave to the administrative department to decide.

No. 84.

AMENDMENT OF ARTICLE 179 OF THE INDIAN LIMITATION ACT, 1908, AND THE PERIOD OF LIMITATION FOR SUBSTITUTING LEGAL REPRESENTATIVES OF A DECEASED PARTY IN AN APPEAL TO THE PRIVY COUNCIL AND THE PRINTING OF RECORD IN CONNECTION WITH SUCH APPEAL

(28th November 1917)

Home Department Proceedings
Judicial A, April 1919, Nos 324—344
(Legislative Department unofficial
No. 974 of 1917).

I will deal with the suggestions put to local Governments in order. They are summarised at page 12 of these notes.

We should, I think, agree to the amendment of Article 179 of the Limitation Act, reducing the period for an application for leave to appeal to 90 days, but this would necessitate a corresponding amendment of the rule prescribed by the Schedule to the Order in Council of 10th April 1838 (*see Safford and Wheelers' Privy Council Practice*, page 492). Applications of this nature are covered by section 5 of the Act which is sufficient to provide for any cases of hardship, though it is noticeable that no such exception is allowed by the Privy Council regulation above referred to, attention might be drawn to this fact.

I think that we may also agree that 90 days is a sufficient period to allow in ordinary cases for applications to substitute the legal representatives of a deceased party. I doubt, however, whether such applications are covered by our Limitation Act or whether we have power to legislate on the point. Once an appeal has gone to the Privy Council, neither the Indian Courts nor the Indian legislature would appear to have any control over the proceedings there. Under the Civil Procedure Code we have legislated to give courts certain powers with reference to appeals to the Privy Council; but none of these powers appear to touch the conduct of the appeal in London and they are strictly confined to matters within our own jurisdiction out here. When an appeal has once been admitted to His Majesty in Council, either under an Indian Court's certificate or under special leave granted in London, any application for substitution of parties would seem to concern the Privy Council only, and except under delegation from it could hardly be dealt with by courts in India. It will be, therefore, for the Privy Council, in the first place at all events, to decide within what period such application must be made. Under Rule 51 of the Judicial Committee Rules, 1908 (*Bentwich's Privy Council Practice*, page 459) reviver applications have to be made to the Privy Council accompanied by a certificate from the Indian

court showing who are the proper persons to be brought on the record, but no period of limitation is prescribed, and I think that the attention of the Privy Council might be drawn to this. It would also be reasonable for them to delegate to the Indian courts a general power of substitution in the case of a death occurring before the despatch of the record to England. This power has been granted in the case of colonial appeals under rule 22 of the Colonial Appeal Rules (Bentwich page 31), but there seems to be no corresponding delegation in the case of Indian appeals.

If the Privy Council were prepared to prescribe a period of limitation for such applications generally, we could bring our Limitation Act into line, and if they were willing to allow some latitude in exceptional cases, we could apply the provisions of section 5 of the Act.

We should, I think, agree to the reduction of the period under this head to 90 days with the existing alternative of six weeks. There should, I think, be power to extend this period for good cause; some limit should be prescribed, and I suggest that an additional two months would be sufficient.

I think that the rule should be as here stated. It would to my mind be a mistake to have a more rigid rule insisting upon security in cash or Government paper in every case.

This no doubt raises a question of some difficulty on which one could hardly expect unanimity.

*See the case cited in the enclosure to the Madras letter of 15th February 1917, which is presumably a case of consolidated appeals.

But it is obvious that revival proceedings are a particularly fertile cause of delay* and are frequently used for obstructive purposes. There seems however to be a considerable consensus of opinion in favour of the proposal. The High Courts of Bombay, Calcutta and Allahabad support it; the Madras High Court are apparently divided on the point, but they agree that it should not be necessary to serve any further notices on parties who have not entered an appearance after the admission of the appeal. The Central Provinces and Sindh courts support the proposal. The Punjab and Oudh Judges are divided. The Burma Chief Court is against it.

Under the circumstances it would be fairly safe to provide that it should not be necessary to bring on the record the representatives of a deceased party who had not appeared either at the hearing in the High Court or upon any subsequent proceedings, but that in such cases advertisements should be published notifying all persons interested, and thus giving them the opportunity of coming in if they desired to do so.

If provision is to be made to this effect it might be done by an amendment of the Civil Procedure Code. This would I think, be within our competence as it would, apart from a mere question of practice in the Privy Council, only touch the effect in India of the Order in Council made upon the appeal, the enforcement of which is now dealt with by Order XLV, Rule 15 of the Code. It would, however, obviously be desirable to obtain the assent of the Privy Council to the amendment as a rule of practice affecting appeals of which they were seised. I also think that to avoid contention as to the effect of such a rule upon the rights of persons who had not appeared in the Privy Council, it would be advisable to enact definitely that notwithstanding the death of any party

to whom the rule applied, the

* i.e., in effect the final decree in the terms of the order* in Council suit.

should have the same force and

effect as if it had been made before the death took place, unless the Privy Council otherwise directed. This saving clause would, I think, be sufficient to cover any cases of possible hardship.

This has been generally accepted.

The Allahabad High Court suggest that they already have powers to dismiss an appeal for delay. But I am not at all sure that this is so. Once an appeal has been admitted by the Privy Council, I cannot think that a High Court in India could have jurisdiction to dismiss it except under special powers granted by Parliament in the ordinary way. We might be able to legislate in India for the withdrawal of a certificate granted by a High Court, but this seems to me to be as far as we could go. Probably the best course would be for the Privy Council to make provision for this on the lines of the Colonial Appeal Rules under which, where an appellant fails to show due diligence in procuring the despatch of the record, the respondent may apply to the local court for a certificate to that effect, upon the granting of which the appeal is deemed to be dismissed (see Rule 21 of the Colonial Appeal Rules cited in Bentwich, pages 30-31).

This is in my opinion the most important question in the case and on the whole I think that our proposals have met with more success in the provinces than I expected. I am for my own part still convinced that it is only on these lines that any real reform can be achieved.

We may, I think, omit Burma and the Central Provinces from consideration. They do not at present print any of their appeals, and so far as I know there has been no question of undue delay in cases coming from these provinces, the number of their appeals moreover is small.

"It is also incumbent on the parties to abide by the other conditions laid down in the award and which it is not necessary to repeat in this decision." It is upon this sentence that Sir Elliot Colvin lays particular stress, and he says of it, "It would seem difficult for the courts to have expressed themselves with more precision in regard to the bearing and general acceptability of the award." I must confess that this seems to me rather a strong assertion to make. The sentence in question occurs at the end of a detailed recital of the terms of the partition and before the objections of Gopal Singh are dealt with, and it appears to mean no more than that there were other terms in the award which were equally binding between the parties but which were not material to the only issue then under consideration, namely, whether the allocation of particular villages to the particular shares should be upheld. Not only was no issue formulated as to the question of succession after the death of a sharer, but the attention of the Court was evidently not drawn to the point in any way, there was no discussion as to the necessity of the Maharaja's sanction to the arrangement nor was it ever asked for as the parties evidently thought that it was not required, and when the case came up to the Maharaja there was nothing even remotely to suggest to him that he was being asked to sign away his prerogative rights.

Under these circumstances, it seems difficult to understand upon what grounds it could be argued at all that the Maharaja had assented to this particular clause of the agreement in the sense of sanctioning an arrangement which was invalid without such sanction. It may fairly be suggested that in confirming the decree of the Revenue Court he was acting only in his judicial capacity and not in his capacity of sovereign; and that giving the fullest effect possible to the sentence quoted from the Revenue Court's judgment above, all that the Maharaja did was to confirm this particular clause of the award *as between the brothers*, his assent to it not being apparently considered necessary and certainly not being asked. But even if these may be thought technical objections (though I am not at all sure that they are), the fact remains that there was admittedly no express assent by the Maharaja, and the only possible ground in law upon which the case for Gopal Singh could be based would be estoppel, the argument being that by confirming the decision of the Revenue Court he had led Gopal Singh to believe that the clause as to succession had his sanction; and this is, I think, the ground on which Sir Elliot Colvin rests his opinion.

Estoppel, however, is a very dangerous basis for any layman's decision, and I doubt if Sir Elliot Colvin quite realized the limitations of it. The doctrine is a purely equitable one, well-known both

to English and Indian law, and there are two essentials of its applicability which are obviously wanting in the present case. The first is that the representation made (in this case by the confirmation of the Revenue Court's decision) must have been made "wilfully" (*Pickard v. Sears*, 6 A. and E., 475), or as section 115 of the Indian Evidence Act puts it "intentionally", i.e., intending it to be acted upon by the other party, and the second that the other party must have acted upon the faith of it to his detriment. Now, in the present case the Maharaja has declared that he never intended to make any representation as to his sanction, and Sir Elliot Colvin accepts this as true and admittedly Gopal Singh has never acted in any way to his detriment upon the alleged representation. It was not as if the courts' decision was not binding upon him, but was accepted by him on the faith of the Maharaja's sanction to the succession clause. The decree was finally binding upon him, and he merely sat down under it because he could not help himself in any way. There was, therefore, to my mind clearly no estoppel and if the case is to be dealt with on either legal or equitable considerations, Gopal Singh in my opinion has no case.

If, therefore, I am right in assuming that the Government of India could only interfere in this case if it was clear that the Maharaja had in 1901 assented to Gopal Singh's right of succession, I am very definitely of opinion that this has not been established. It seems to be suggested in the notes that the Maharaja's disposition of the estates of Sheonath Singh and Ganpat Singh was the result of corruption, and this may no doubt have influenced Sir Elliot Colvin's attitude towards the present claim, but there is nothing in the papers submitted to me which would justify my basing any conclusions upon this suggestion.

No. 83.

INTERPRETATION OF THE TERM "FINDER" UNDER
THE INDIAN TREASURE TROVE ACT, 1878.*(25th November 1917.)*

THIS is a memorial to the Government of India in which it is claimed that a decision of the Collector under Section 7 of the Indian Treasure Trove Act, 1878, was wrong. The decision is admittedly final under Section 17 of the Act, and there does not seem to be any chance of a claim being made against the Government by the memorialist in the courts. I do not think therefore that the case is carried by rule 17(e) of the rules of Business. It may be that it comes under Rule 17 (g), but this is a rule which we have recently honoured more in the breach than the observance, and I think that when the case arises directly after a memorial to the Government of India, and at all events *involves* a question of construction under one of our Acts, we ought not to be astute to throw it out.

I have read the papers, and think that the decision of the Collector on the facts was right. The memorialist was clearly acting throughout in his capacity of Tahsildar with the aid of the police and the village officials, and it seems clear that apart from this aid and the information which he had received in his official capacity, he would never have made the "find" at all. He admits that he employed men to dig for him, and it is not disputed that they were paid out of Government funds. If the diggers whose actual hands turned up the vessels were not the "finders" within the meaning of the Act on the ground that they were merely servants or employees, it would seem to be obviously inconsistent not to apply the same reasoning to the Tahsildar himself who clearly employed them on behalf of Government. The Tahsildar was in fact only a middleman between his employees and his employer and I cannot see how under the circumstances he could have been held to be individually the "finder".

Whether the reward granted to the memorialist was sufficiently liberal or not, I must of course leave to the administrative department to decide.

No. 84.

AMENDMENT OF ARTICLE 179 OF THE INDIAN LIMITATION ACT, 1908, AND THE PERIOD OF LIMITATION FOR SUBSTITUTING LEGAL REPRESENTATIVES OF A DECEASED PARTY IN AN APPEAL TO THE PRIVY COUNCIL AND THE PRINTING OF RECORD IN CONNECTION WITH SUCH APPEAL.

(28th November 1917.)

Home Department Proceedings I will deal with the suggestions
 Judicial A., April 1919, Nos 324—344. put to local Governments in
 (Legislative Department unofficial order. They are summarised at
 No. 974 of 1917). page 12 of these notes.

We should, I think, agree to the amendment of Article 179 of the Limitation Act, reducing the period for an application for leave to appeal to 90 days, but this would necessitate a corresponding amendment of the rule prescribed by the Schedule to the Order in Council of 10th April 1838 (*see Safford and Wheelers' Privy Council Practice*, page 492). Applications of this nature are covered by section 5 of the Act which is sufficient to provide for any cases of hardship, though it is noticeable that no such exception is allowed by the Privy Council regulation above referred to, attention might be drawn to this fact.

I think that we may also agree that 90 days is a sufficient period to allow in ordinary cases for applications to substitute the legal representatives of a deceased party. I doubt, however, whether such applications are covered by our Limitation Act or whether we have power to legislate on the point. Once an appeal has gone to the Privy Council, neither the Indian Courts nor the Indian legislature would appear to have any control over the proceedings there. Under the Civil Procedure Code we have legislated to give courts certain powers with reference to appeals to the Privy Council; but none of these powers appear to touch the conduct of the appeal in London and they are strictly confined to matters within our own jurisdiction out here. When an appeal has once been admitted to His Majesty in Council, either under an Indian Court's certificate or under special leave granted in London, any application for substitution of parties would seem to concern the Privy Council only, and except under delegation from it could hardly be dealt with by courts in India. It will be, therefore, for the Privy Council, in the first place at all events, to decide within what period such application must be made. Under Rule 51 of the Judicial Committee Rules, 1908 (*Bentwich's Privy Council Practice*, page 459) reviver applications have to be made to the Privy Council accompanied by a certificate from the Indian

court showing who are the proper persons to be brought on the record, but no period of limitation is prescribed, and I think that the attention of the Privy Council might be drawn to this. It would also be reasonable for them to delegate to the Indian courts a general power of substitution in the case of a death occurring before the despatch of the record to England. This power has been granted in the case of colonial appeals under rule 22 of the Colonial Appeal Rules (Bentwich page 31), but there seems to be no corresponding delegation in the case of Indian appeals.

If the Privy Council were prepared to prescribe a period of limitation for such applications generally, we could bring our Limitation Act into line, and if they were willing to allow some latitude in exceptional cases, we could apply the provisions of section 5 of the Act

We should, I think, agree to the reduction of the period under this head to 90 days with the existing alternative of six weeks. There should, I think, be power to extend this period for good cause; some limit should be prescribed, and I suggest that an additional two months would be sufficient.

I think that the rule should be as here stated. It would to my mind be a mistake to have a more rigid rule insisting upon security in cash or Government paper in every case.

This no doubt raises a question of some difficulty on which one could hardly expect unanimity.

*See the case cited in the enclosure to the Madras letter of 15th February 1917, which is presumably a case of consolidated appeals.

But it is obvious that revival proceedings are a particularly fertile cause of delay* and are frequently used for obstructive purposes. There seems however to be a considerable consensus of opinion in favour of the proposal. The High Courts of Bombay, Calcutta and Allahabad support it; the Madras High Court are apparently divided on the point, but they agree that it should not be necessary to serve any further notices on parties who have not entered an appearance after the admission of the appeal. The Central Provinces and Sindh courts support the proposal. The Punjab and Oudh Judges are divided. The Burma Chief Court is against it.

Under the circumstances it would be fairly safe to provide that it should not be necessary to bring on the record the representatives of a deceased party who had not appeared either at the hearing in the High Court or upon any subsequent proceedings, but that in such cases advertisements should be published notifying all persons interested, and thus giving them the opportunity of coming in if they desired to do so.

If provision is to be made to this effect it might be done by an amendment of the Civil Procedure Code. This would I think, be within our competence as it would, apart from a mere question of practice in the Privy Council, only touch the effect in India of the Order in Council made upon the appeal, the enforcement of which is now dealt with by Order XLV, Rule 15 of the Code. It would, however, obviously be desirable to obtain the assent of the Privy Council to the amendment as a rule of practice affecting appeals of which they were seised. I also think that to avoid contention as to the effect of such a rule upon the rights of persons who had not appeared in the Privy Council, it would be advisable to enact definitely that notwithstanding the death of any party

to whom the rule applied, the

* *e.*, in effect the final decree in the terms of the order* in Council
suit. should have the same force and

effect as if it had been made before the death took place, unless the Privy Council otherwise directed. This saving clause would, I think, be sufficient to cover any cases of possible hardship.

This has been generally accepted.

The Allahabad High Court suggest that they already have powers to dismiss an appeal for delay. But I am not at all sure that this is so. Once an appeal has been admitted by the Privy Council, I cannot think that a High Court in India could have jurisdiction to dismiss it except under special powers granted by Parliament in the ordinary way. We might be able to legislate in India for the withdrawal of a certificate granted by a High Court, but this seems to me to be as far as we could go. Probably the best course would be for the Privy Council to make provision for this on the lines of the Colonial Appeal Rules under which, where an appellant fails to show due diligence in procuring the despatch of the record, the respondent may apply to the local court for a certificate to that effect, upon the granting of which the appeal is deemed to be dismissed (see Rule 21 of the Colonial Appeal Rules cited in Bentwich, pages 30-31).

This is in my opinion the most important question in the case and on the whole I think that our proposals have met with more success in the provinces than I expected. I am for my own part still convinced that it is only on these lines that any real reform can be achieved.

We may, I think, omit Burma and the Central Provinces from consideration. They do not at present print any of their appeals, and so far as I know there has been no question of undue delay in cases coming from these provinces, the number of their appeals moreover is small.

The principal objector of importance is, as might be expected, Calcutta, where vested interests no doubt stand in the way of any changes in the time-honoured policy of procrastination. The judges rely upon the fact that when a similar proposal was made some years ago the Privy Council accepted their reasons for objecting to it as sufficient. But inasmuch as Bengal appeals are still the principal sinners in the matter of delay, I do not think that we can agree that this is conclusive. When their objections come to be examined in detail they really amount to very little. The cost of printing the additional copies required is, as I pointed out in my note of 25th August 1916 (which was based on a practical estimate prepared by our own printers), negligible, amounting in the case of an average appeal book of 200 pages to only Rs 22. What the additional cost of the "better paper" required by the Privy Council would be I am unable to say, the "card-board covers" upon which they lay stress would not be required as the Privy Council Books would be bound in London; "long marginal notes" again, certainly would not amount to much, and I am unable to understand why "the rates for estimating, translating, and examining and printing" should be materially higher if the books are to be printed in Privy Council form, it is at all events to be noted that none of the other courts press this objection. If the additional cost of the superior paper is really a material item, I feel very little doubt that the Privy Council would be willing to meet us with regard to it. They might also, I think be willing to cut down the marginal references which are not in practice of great use, and it seems clear from Lord Buckmaster's letter of 16th January 1917, that the Privy Council see no object in having special translations.

The only objection the Madras High Court has is that possibly more documents would have to be printed in full, but they say that even now "the really material documents are generally printed in full for the High Court, and if anything material should be omitted, it would be sure to come to light during the hearing of the appeal in the High Court." Here again, I think, it is quite possible that the Privy Council would be willing to meet us, and would be satisfied with the materials which were before the High Court in India.

The Allahabad High Court object on the ground of the additional cost involved, and this has already been dealt with above.

The Patna High Court take a similar objection but are willing to accept the suggestion in the case of appeals valued at Rs. 50,000 and "in other cases when it appears desirable."

Bombay only print Original Side Appeals, and are willing to adopt our suggestions in all such cases. As a matter of fact

they form the large majority of appeals from this province. Out of 19 appeals from Bombay reported in the last six volumes of the Indian Appeals Series, 14 are Original Side cases.

The Oudh Court agrees generally to our suggestions. They do not print at all at present, but are apparently proposing to do so in the immediate future

The Punjab Court agrees *qua* First Appeals which is all that is material "Second appeals" only lie on a question of law, and if taken to the Privy Council necessitate only an abbreviated form of record (*see* Rule 25 of the 1908 Rules, Bentwich, page 451).

Taking the replies as a whole, I think that we should disregard the objections of Calcutta and Allahabad, and press for the adoption of our suggestions in the case of all appeals over Rs 10,000 where the record is ordinarily printed for the High Court. Unless this can be effected I am satisfied that there will be no real improvement. Quite apart from the question of delay, it is a scandalous waste of money to print the record over again for the purpose of an appeal to the Privy Council, and this is recognised in paragraph 4 of Lord Buckmaster's letter above referred to. The saving of the cost of this second printing would be so very considerable that it would be quite easy to provide a fund out of which the extra cost of printing in cases which do not eventually go to the Privy Council might be defrayed : *see* the footnote at page 12 of my notes of 25th August 1916.

There is one other point with which I might deal in this connection, and that is the arrangement of the papers to which several of the courts have adverted. If the books were sent to England unbound with each Exhibit printed separately and paged at the foot, the materials required for presentation to the Privy Council could be re-arranged there for binding (*see* paragraphs 5 and 7 of my previous note). It seems quite clear that there must always be great difficulty in deciding out here what papers should be included in the Privy Council record (*see* in this connection paragraph 4 of the letter from the Judicial Commissioner of Sindh, dated 18th November 1916), with the result that frequently the book is overladen with page after page of utterly irrelevant matter. If, however, the Privy Council would send us a synopsis of the form in which they wish records to be prepared, showing the order in which the depositions and exhibits, etc., should be arranged, I feel no doubt that the Indian Courts would be willing to adopt a similar arrangement, and this might result in a material saving of labour in the preparation of the books in England. Sir James Du Boulay in paragraph 7 of his note dated the 27th October 1917

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seems to think that as the final making up of the book would have to be done by a clerk instead of an ordinary printer, additional expense would be involved ; but obviously this would be an insignificant item in the bill of costs prepared with the saving of the reprint, and probably under existing conditions the arrangement of the Record in Privy Council form must always be a clerk's and not a printer's work.

I append to this note a tabular statement showing the number of appeals from each of the High Courts reported in the last six volumes of the Indian Appeals. This shows that far the largest number of cases goes up from Calcutta against whom the most frequent complaints of delay have been made. There have also been 3 appeals during that period from Sindh which are not yet reported, but in all of them there appears to have been very great delay in India.

There is a suggestion in Mr. Chamberlain's letter to the Viceroy that leave to appeal is perhaps too easily granted. I do not think myself that there is any foundation for this. In the larger number of cases certainly, the grant of the certificate is a matter of right under the Civil Procedure Code and special certificates under section 109(c) of the Code are very rare. The only cases in which laxity on the part of Indian Courts is likely to occur is with reference to the substantiality of a question of law under the last paragraph of section 110, but I am not aware that complaints have been made in recent years under this head.

Abstract of Indian Appeals reported in Volumes XXXIX to XLIV of the Law Reports Series.

Presidency or Province.	Volume XXXIX.	Volume XL.	Volume XLI.	Volume XLII.	Volume XLIII.	Volume XLIV.	Total.
Madras	3	2	3	1	6	2	17
Bombay	2	4	.. 3	8	4	1	19
Bengal	6	5	13	9	9	8	50
Allahabad	5	5	5	9	6	2	32
Oudh	4	5	3	..	4	..	16
Punjab	1	3	..	1	..	1	6
Burma	3	2	2	..	4	2	13
Central Provinces	1	2	1	..	1	..	5
Ajmer-Merwara	1	..	1

No. 85.

THE SCOPE OF SECTION 19 OF THE CRIMINAL APPEAL ACT, 1907 AND THE DESIRABILITY OF AMENDING THE CODE OF CRIMINAL PROCEDURE, 1898, IN TERMS OF THAT SECTION.

(29th November 1917)

I THINK that local Governments and High Courts might be consulted on the Bombay proposal, though I doubt if any case has been made out for the amendment.

Home Department Proceedings Judicial A., February 1918, Nos. 108-109.
(Legislative Department unofficial No. 1030 of 1917.)

The powers granted to the Secretary of State by section 19 of the Criminal Appeal Act, 1907, were intended to supplement the existing procedure on prerogative petitions. What that procedure was had been fully explained in a well known memorandum issued in connection with the Beck inquiry and printed as an appendix to the report on that case in the Parliamentary papers for 1904.* It will be found,

*It is not available in Delhi but can be obtained if necessary from Calcutta.

G. R. L.

I believe, on a perusal of this memorandum that the Home Office frequently held extra

judicial inquiries such as the Bombay Government felt called upon to make in the case reported, where fresh evidence was discovered after conviction. It was not intended by the provisions of section 19 of the Act to supersede this practice which had frequently proved of the greatest value, but merely to give the Secretary of State power in a case where he thought it desirable to refer either the whole case or a particular question to the Court of Appeal. There is I think, reason to suppose that one of the main objects of this proposal was to relieve the Home Secretary in England of some share of the odium which frequently attached to his supposed unreasonable refusal to interfere in cases which had been widely discussed in the newspapers (*see* the speeches of Mr Akers Douglas and Mr. Gladstone on the Bill, Hansard, Volume 175, 177-189).

Such inquiries seem to be much less frequent out here, though the number of cases which come up are presumably much greater, and the mere fact that Bombay had had to hold one such inquiry hardly seems sufficient justification for the proposed amendment. There may, no doubt, be disadvantages attached to informal inquiries of this nature, but it is obvious that these may be outweighed by other considerations such as those noted in the speeches above referred to.

Death-sentence cases are excluded from the operation of section 19 of the English Act, but I can see no reason in any case for going further in this direction than they have done at home. Out here every such case must have been before a court of appeal, which would not be so under the 1907 Act. I cannot find any reason given for the specific exclusion of death-sentence cases either in the debates on the Bill in Parliament or in the only text-book available here (Wrottesley and Jacobs on Criminal Appeals); but I feel no doubt that it was in order to avoid undue delay in the carrying out of capital sentences, which until comparatively recent times had by the law of England to be carried out within 48 hours.

I do not see why an amendment of our law on the lines of section 19 (a) need necessarily embarrass Government, as Sir William Vincent suggests. It would be entirely within the discretion of Government to refer a case back or not, and no doubt the discretion would be very sparingly used.

If it is desirable that there should be such a power of reference under section 401 of our Code, I do not think that the provisions of the Letters Patent of the various High Courts barring appeals in Original Side criminal cases should stand in the way of it. It must be remembered that under section 106 of the Government of India Act as it now stands the Letters Patent can be amended as required.

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No. 86.

EXEMPTION FROM INCOME-TAX AND SUPER-TAX
OF THE ALLOWANCE OF THE NAWAB BAHADUR OF
MURSHIDABAD.

(3rd December 1917)

I do not like in ordinary cases being asked to advise on a legal question where the opinion of the Advocate-General has already been taken, and in this Department we ordinarily decline to do so. This, however, is a special case which comes to me at the request of His Excellency the Viceroy, and I have no desire to shirk the responsibilities entailed. I should, perhaps, have the less compunction in forming my own opinion on the case owing to the fact that Mr. Mitter has given no reasons for the conclusion to which he has come, and I am not sure that he has considered the case from what seems to me to be the proper point of view.

The Agreement made with the Nawab in 1891 having been Murshidabad Act of 1891 (XV of 1891) definitely validated by, and incorporated in, Act XV of 1891, is as much a part of the law of India as Act II of 1886 under which income-tax is levied. The sum of Rs. 2,30,000 payable to the Nawab under the former Act is no doubt an annuity within the meaning of section 7 of the Income-Tax Act, and according to the terms of that section every payment to the Nawab by Government in respect of the annuity "shall be reduced by the amount of the tax". But in virtue of the provisions of Act XV of 1891, the sum of Rs. 2,30,000 is to be paid from the revenues of the Government of India "by equal monthly instalments of Rs. 19,166-10-8". These two provisions are of co-ordinate authority, but are to my mind clearly inconsistent, and unless there is something in the later Act to indicate that payments under it are to be subject to the reduction prescribed by the earlier Act, the provisions of the later Act must, according to all legal principles, clearly prevail; *Leges posteriores contrarias abrogant* a maxim which I believe goes back to Livy.

Ibid. The later Act (XV of 1891) consists of course mainly of the Indenture, and I can find nothing in it to indicate that it is intended to be subject to the provisions of the Income-Tax Act of five years earlier. Indeed all the indications are the other way. In the first place the provision that the annuity is to be paid out of the Gov-

ernment revenues seems to be inconsistent with the idea that at the time of payment a portion of the sum is to be put back into the very pocket from which the payment was made. In the next place the operative clause of the Indenture states that these particular payments are to be made for the due maintenance and support of the Nawab's position and dignity, the payments in question being specified in meticulous figures running into annas and pies, then again it will be found that definite provision is made for the payment of Government dues *and taxes* on the immoveable properties, but there is no hint as to any tax being payable on the annuity. Moreover it is in terms provided that if the Government dues and taxes payable in respect of the immoveable properties are not paid by the Nawab the Treasury Officer (*i.e.*, the person by whom the annuity is paid) may with the authority of the Secretary of State retain them out of the monthly instalments of the annuity. This is an express provision for the retention of any tax due on the immoveables, and under the well known maxim *expressio unius exclusio alterius* implies that no other retention is to be made. Lastly it is provided towards the end of the indenture that in the case of waste or mismanagement the Secretary of State shall be entitled "to take and retain the said monthly sum of Rs. 19,166-10-8 payable from the Government Treasury as hereinbefore mentioned" and apply it for the maintenance of the position and dignity of the Nawab. So far, therefore from the Murshidabad Act implying that a portion of the Murshidabad Act of 1891 (XV of annuity is to be retained by 1891).

the Treasury Officer on account of income-tax, it seems clearly to contemplate the full sum being available for the purposes of the Act. If the Income-Tax Act had been passed subsequently to the Murshidabad Act, it might be a question whether its provisions were not to be engrafted on to those of the earlier Act, though even in this case having regard to the points noted above there might be a good deal to be said on the other side. But having regard to the fact that the Murshidabad Act was five years later than the Income-Tax Act, and was presumably enacted with the full knowledge of the provisions contained in it, I feel little doubt that the payments under the Murshidabad Act are not subject to deduction on account of the tax.

In the past the Nawab has submitted, apparently without protest, to the income-tax deductions which have been made in respect of a portion of Rs. 2,30,000. This no doubt, may preclude him from claiming a refund since 1891, but cannot defeat his objection to any further deductions being made in the present or future. It is only in a very limited class of cases that the conduct of parties can be held to be material to the construction of a document and this is certainly not one of them. The truth probably is that while

income-tax stood at only 5 pies in the rupee it was not worth his while to object whereas the increased burden under recent legislation makes it material for him to do so. I notice that

in the case of the Maharaja of Internal B., December 1907, No. 57. Benares though the deduction of income-tax which had been made in the past was held to be unjustified, it was only thought necessary to inform him that a remission would be made in the future, and that this was treated as an act of grace. If the view I have expressed above is accepted, it may be considered sufficient to adopt the same course in the present case.

No. 87.

A SELF CONTAINED SET OF RULES UNDER THE ARMS
ACT FOR BERAR.*(3rd December 1917.)*

THE PRESENT position with regard to the really non-existent "Berar Rules" under the Arms Act is a strong justification for Secretary's proposal that in all cases where the rule making power under an Act, adopted for particular territory under the Foreign Jurisdiction Order in Council, is being exercised, a self-contained set of rules should be issued for that territory and I think that we should certainly recommend that this should be done in future. I also agree that having regard to the existing complications in the case of Berar, the Foreign and Political Department might consider the desirability of asking the Chief Commissioner of the Central Provinces to get out a self-contained set of Rules under the Arms Act for Berar.

Foreign and Political Department,
Proceedings General A, April 1918,
Nos. 1—26

(Legislative Department unofficial
No. 1037 of 1917)

No. 88.

CERTIFICATE OF NATURALIZATION UNDER ACT XXX OF
1852 AS CONFERRING IMMUNITY FROM THE PRO-
VISIONS OF THE FOREIGNERS ACT, 1864.

(*Case of Mme. Meli.*)

(*12th December, 1917.*)

I do not think there is any doubt that the wife of a man who has obtained a certificate of Naturalization under Act XXX of 1852, is, in British India, in the same position as the wife of a natural born British subject. But notwithstanding this she can be dealt with as a "Foreigner" under Act III of 1864. This is undoubtedly an anomaly and arises solely from the artificial definition of foreigner adopted in the last mentioned Act. Ordinarily speaking there can be no doubt that it is awkward to say the least of it, to treat one and the same person as both a British subject and a foreigner and I am not surprised that the Swiss Minister should find himself unable to understand the position. The question is really one of policy, as the anomaly has been adopted of set purpose. I don't know whether a case has ever arisen in which it has been desired to deal with the wife of a British subject under the Foreigners Act, if the case never has occurred in the past, it may be hardly worth while to maintain the "anomaly". I believe, however, that there were several cases in England at the outbreak of the war in which foreign prostitutes went through the form of marriage with British subjects in order to escape internment. It would I think be open to the wife of a person naturalized under the Act of 1852, who was not herself either British born or naturalized, to apply for a certificate under that Act, so as to take herself out of the purview of the Foreigners Act; and this procedure may meet the requirements of Mme. Meli's case. I do not think that we should undertake any further legislation by way of tinkering with the question of foreigners until a definite policy has been decided upon. It may be that the whole question of Colonial naturalization will have to be revised after the war or at all events that our Indian Naturalization Act will be confined to the cases of natives of the East.

No. 89.

QUESTION WHETHER A COURT-MARTIAL CAN PASS ORDERS UNDER SECTION 517 OF THE CODE OF CRIMINAL PROCEDURE, 1898.

(22nd December, 1917.)

THE conviction of Jehangir Fakirji having been set aside, we need not concern ourselves with the question whether, if Section 517 of the Criminal Procedure Code applies to trials by Courts-Martial, the section was rightly applied in that case. As Secretary points out, the decision reported in I. L. R. 24-Cal. 499 is not very convincing, and a Court-Martial would certainly not be bound to follow it.

Home Department Proceedings
Judicial February 1918, Nos 210-211.
(Legislative Department unofficial
No. 991 of 1917)

The questions for our consideration are—

- (i) whether a Court-Martial held under Section 41 of the Indian Army Act has the powers conferred on criminal courts in British India by Section 517 of the Criminal Procedure Code, and
- (ii) if so, whether an order made under this section by a Court-Martial in Mesopotamia is enforceable by summary process in respect of property which is in British India.

With regard to (i), Section 41 of the Indian Army Act authorises the imposition by a Court-Martial of "any punishment assigned for the offence by the law of British India." The provisions of Section 517 of the Criminal Procedure Code are, or certainly may be, of a punitive nature, but I doubt if an order of confiscation under this section is a "punishment assigned by law for the offence." If it is not, I do not think that an order under Section 517 can be passed by a Court-Martial at all. In my opinion the mere fact that a Court-Martial is a court recognised by the Criminal Procedure Code is not sufficient to vest all powers conferred on the ordinary criminal courts of British India by the Act on Courts-Martial. (See the opinion previously given by this department on 10th May 1917, on A. G. 10 Case No. 52552, Discipline, I A., slip XX m blue). I would, therefore, answer this question in the negative.

In the view I take of (i) no answer is required to (ii); but even if I am wrong as to (i) I think it clear that an order passed by a Court-Martial in Mesopotamia confiscating property in British India would not be enforceable under the Criminal Procedure Code, and there certainly is no provision for enforcing it in the Indian Army Act.

The question whether provision should be made in the Indian Army Act to supply these lacunae is, I understand, being taken up on a separate file.

No. 90.

PROPOSED AMENDMENT OF THE INDIAN ARMY ACT, 1911.

(22nd December, 1917)

THE Army Department's proposals have been examined with great care by Secretary and Adjutant General's Branch Proceedings Judicial A, September 1919, Deputy Secretary and I have Nos. 2261—2270 and Appendix really nothing to add to their (Legislative Department unofficial notes. I have been through No. 1085 of 1917.) all the proposed amendments and am in general agreement with Secretary's note. Most of the questions involved are purely military ones arising from six years' experience of the working of the Act and particularly in connection with the present war, and there is very little to object to in them from the point of view of this Department.

Colonel Caruana's¹ (iv), section 15 of the Act.—The proposal is to repeal this section altogether, but I suggest that it may be desirable to retain the proviso in some shape in order to make it clear that where a convict is retained in the ranks his service therein shall be reckoned as part of the term of his sentence. There would seem to be no very special reason to abrogate this concession. The point at all events requires consideration.

Colonel Caruana's (xii).—The saving of a failure to swear the interpreter might, I think, be provided for by the rules by which alone the administration of an oath is prescribed. There would seem to be no particular object in providing for it by the Act.

Colonel Caruana's (xv), section 91 of the Act.—It is, I think, very doubtful to say the least of it, section 82 of the Evidence Act applies, and I think that we should not object on this ground to the proposed amendment.

Colonel Caruana's (xix), section 100 of the Act.—What seems to be required is to embody in the Act a provision on the lines of section 58 of the Criminal Procedure Code.

With regard to Colonel Caruana's proposal to refer in section 43 of the Act to imprisonment either "rigorous or simple," on the ground that officers holding courts-martial are not familiar with the provisions of section 3 (26) of the General Clauses Act, it is

¹The Judge Advocate General.

certainly desirable to avoid such an amendment if possible, and the Army Department will, no doubt, consider if the case could not be met by a note as suggested by Deputy Secretary. If it is really thought vital to make the amendment proposed, I think that the Act would have to be scrutinized with some care to see if similar amendments would not be required elsewhere. It is always dangerous, where an Act has been drawn on the basis of the General Clauses Act applying, to introduce an amendment of this nature in one particular section.

No. 91.

“RE-ENACTING” OF ORDINANCE WITHIN THE MEAN-
ING OF SECTION 30 OF THE GENERAL CLAUSES ACT
1897.

(3rd January, 1918.)

I THINK that section 30 of the General Clauses Act (X of 1897) has escaped Sir Sale's notice. (Legislative Department unofficial No. 1108 of 1917.) It was inserted by the second Repealing and Amending Act of 1914. In virtue of this section an Ordinance now comes within the purview of section 24 of the General Clauses Act, and the winding up order of 1916, though made under the Ordinance, would seem still to be in force under Act X of 1916. I doubt if it could seriously be argued that the Ordinance was not “re-enacted” within the meaning of the section by Act X of 1916.

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No. 92.

(I—II.)

INTERPRETATION OF THE SERVICE QUALIFICATION
FOR APPOINTMENT TO THE GOVERNOR-GENERAL'S
EXECUTIVE COUNCIL (CASES OF SIR SANKARAN
NAIR AND SIR JAMES MESTON.)

I.

(23rd January, 1918.)

I AGREE that the expression "persons who at the time of their appointment have been for at least ten years in the service of the Crown in India" should be read as importing a ten years' period of service immediately preceding appointment. The case is, I think, indistinguishable from *Re, Storrie University Gift*, cited by Secretary, by which I think we should be guided.

If the case of Sir C Sankaran Nair¹ is important I should like to know the exact periods of his service before giving an opinion. I would however point out that if a non-service man were appointed to the Executive Council relying on the fact that Sir Sankaran Nair was a service man, it might circumscribe the choice of his successor

 II.

(1st February, 1918.)

I think it is clear that all which is necessary is that Sir James Meston² should be a member of the Indian Civil Service at the time of his appointment. His subsequent retirement *at any time* would not affect the constitution of the Council.

¹Education Member.

²Finance Member.

No. 93.

RECIPROCAL SERVICE OF SUMMONS BETWEEN BRITISH INDIA AND EGYPT.

(2nd February, 1918.)

I AGREE that we have no legal power to serve this summons and that we ought not to instruct our officers to do an act, which is illegal. I also feel that, unless we are compelled to do so, we ought not to serve any process on our own subjects which they obviously cannot obey. The summons in this case is returnable on February 9th and it is clear that the party concerned could not appear before a court in Cairo on that date.

Section 29 of the Civil Procedure Code is intended to meet cases of this sort, and having regard to the present position of Egypt as a British Protectorate, I think that we should tell them that we shall be quite prepared to notify the Mixed Tribunals in Egypt under this section, provided they agree to reciprocal action. They must also be asked to send us a translation of every summons sent to us for service.

I should also like to see more use made of section 29 generally in connection with British possessions on a reciprocal basis, as difficulties of this nature are constantly occurring in practice. After the war it might be worth while to get out a Circular letter on the subject and ask the Secretary of State to send it round to the various British possessions who have any dealings with British India.

No. 94.

(I—V.)

PROPOSED AMENDMENT OF THE CODE OF CRIMINAL
PROCEDURE, 1898, (TENDERING OF EVIDENCE BY
AN ACCUSED PERSON ON HIS OWN BEHALF.).

I.

(15th June, 1917.)

I doubt if it would be safe to advise the Home Department that a power to cancel an order under section 565 is included under section 401. The wording seems to me to be against this. At the same time I fully agree that section 401 *ought* to include this power. An order under section 535 is clearly penal and in the nature of "punishment," but I doubt whether it is "punishment" to which the convict has been "sentenced." The distinction between the sentence and the order in such a case seems to me to be a very definite one.

These convicts are enrolled for two years or the duration of the war, and this should, I think, give us time to amend section 401. Possibly it will be found desirable to amend it so as to cover all orders of a penal nature. In the meantime all, I think, that can be done, is to issue executive instructions that any enrolled convicts who may be released in India, and who would otherwise be found to report, should not be proceeded against if they fail to do so. I do not think that this obligation should be enforced if they earn their remission.

I have looked at the Viceroy's Warrant, but it does not help us.

II.

(26th October, 1917.)

With reference to the first proposal, *re* trial of children below 15, I agree to the proposed amendment of the law. Jails A., June 1917, Nos. 19-20. It may be that we shall gain some useful experience from the Madras Bill, but we cannot wait for it, and I think that this is a step in the right direction. I would also accept Mr Rowland's¹ suggestion that the magistrates to try such cases should be magistrates specially empowered under section 8 (2) of the Reformatory Schools Act 1897.

¹Attaché in the Legislative Department.

With regard to the second proposal that an accused person should be made a competent witness on his own behalf, I have always felt very grave doubts as to the desirability of this in India. I am however quite willing that the question should be re-opened and should have no objection to the proposal being embodied in the Bill. We have a strong legal element in Council whose opinions on the point will be valuable, and I have reason to think that some at all events of the members are in favour of it. I think that we should only put the proposal forward tentatively and let the Council decide. It is not an amendment which I should be prepared to press in the face of considerable opposition.

I think the third amendment proposed with reference to section 356 is a reasonable one.

I doubt if the proposed amendment of section 386 is necessary, but I should have no objection to its insertion in the Bill. As I understand it the object of the amendment would be to make it clear that in ordinary cases where imprisonment is suffered in default of payment of a fine, the latter should not be realized. The modern policy of the law is, I would observe, to try and realize fines in all possible cases so as to save the convicted person from going to gaol, thus saving expense to the State and avoiding the degradation of the convict. But where the latter has gone to gaol and served the whole or any part of the alternative sentence, it seems reasonable that the fine or the proportionate part of it, should not be exacted by way of double punishment, except perhaps in the sort of cases referred to in the Bombay Government's letter of 19th December 1916. Such cases however are probably very infrequent.

III.

(13th February, 1918.)

WITH reference to Sir Sankaran Nair's¹ note on the proposed sub-section (6) of section 124, I think that this is what is intended. The drafting of the new sub-section will, no doubt, require attention. The Bombay draft is only tentative.

Proposed sub-section (4) of section 124—I think it is quite possible that the High Courts may press for a reference to them or to the Sessions Court where the original security order was made by the High Court or Sessions Court. If they do not do so, I should

¹Education Member.

be willing to leave it to the Magistrate. The present proposal is only to introduce the new sub-section tentatively in this form and to reconsider the matter after we have heard what the Courts have to say on it.

Proposed section 29(a)—I am unable to agree with Sir Sankaran Nair's note on this point, I think that it is very desirable to provide for summary trials in the cases of juvenile offenders. There is obviously much more chance of their contamination while detained in jail awaiting trial than in the case of adults and it is to my mind of great importance to minimise this evil as far as possible.

My Hon'ble Colleague's proposal to allow an accused person "to give evidence on his own behalf," but not to be cross-examined can, I think, hardly be accepted. The principal object of cross-examination is to test the truth of the deponent's statement and unless it is subjected to this test it can hardly be treated as "evidence" at all.

IV.

(25th April, 1918.)

I agree that there is nothing in the Evidence Act which precludes an accused from testifying on his own behalf, and that it is only section 342 of the Criminal Procedure Code which prevents him doing so. This certainly seems to suggest that, if the principle is accepted, it is the Code and not the Evidence Act that should be amended. I do not, however, think that it is necessary to consult local Governments as to how the amendment of the law should be effected.

The question how section 342 should be dealt with is a difficult one, on which we certainly want to know the views of local Governments, and we shall probably have to be guided largely by the advice of our Legislative Council. I am inclined myself to think that the suggestion in the India Office's letter is reasonable, and that if an accused is to be a competent witness in his own behalf, nothing more is required than to record any voluntary statement he may desire to make without going into the box.

The case of an unrepresented accused will also require consideration. It may be sufficient to provide specifically that he should be warned that he is not bound to go into the witness-box, and that if he does so, he will have to submit to cross-examination. In a sessions case the committing magistrate might also be required to tell him that he will have another opportunity of giving evidence

V.

(26th April, 1918.)

These opinions are interesting, but I have hardly anything to add to my previous note after perusing them. I think there will be great difficulties in applying the new principle to trials only in the High Courts and Courts of Session, but I agree that this should be put to local Governments. I still think that the Criminal Procedure Code is the proper place for the amendment, but this will be for consideration later when we come to draft. I doubt if anything would be gained by dealing with the matter by a special Act. It was no doubt convenient, if not necessary, to do so at home, as they have neither a Criminal Procedure Code nor an Evidence Act.

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No. 95.

APPOINTMENT OF A WHOLE TIME SOLICITOR TO THE
GOVERNMENT OF INDIA.*(18th February, 1918.)*

THE Government of India obtains legal advice through two separate channels "A" the Home Department Proceedings separate channels "A" the Judicial Department 1918, No. 147. Government Solicitor, and (Legislative Department unofficial "B" the Legislative Department No. 328 of 1917.) ment.

A.—The present Government Solicitor is Mr. C. H. Kesteven, a member of the firm of Messrs Sanderson and Company, Solicitor, Calcutta. He is not required to give up his connection with the firm and his headquarters remain in Calcutta. In so far as the Government of India are concerned, his duties are to conduct the entire civil legal business of that Government with the exception of business in the District Courts. He is also under an obligation to advise on criminal work for the Government of India; he deals with conveyance matters and other legal questions which may be referred to him by the Government of India, and he is the channel through which the opinion of the Advocate-General of Bengal is obtained. He has other duties in connection with Provincial Governments which need not be dealt with here, and receives a lump contract allowance of Rs. 4,000 per mensem for his work as Solicitor to the Government of India, Bengal, Bihar and Orissa and Assam.

So long as the headquarters of the Government of India during the cold weather were in Calcutta, the solicitor's services were fairly available for advice during half of the year, and it was arranged in 1906 that he should keep a representative in Simla for the other half of the year, an additional allowance of Rs. 12,000 being made to him for this. Full advantage, however, does not seem to have been taken of the new arrangement, owing in part no doubt, to the fact that the representative in question was of rather junior standing and frequently had to send the papers submitted to him to Calcutta for consideration, which entailed as much delay as a direct consultation by post. In 1913, this system was discontinued and no representative of the Government Solicitor attended at Simla in that year; but it was again adopted in 1914 and has continued until the present time.

Judicial A., November 1913, No. 261.

Judicial A., September 1918, Nos. 248-249.

The Government Solicitor is also a Member of the Imperial Legislative Council and receives an honorarium of Rs 7,500 for his attendance in Delhi during the cold weather Session, with the result that he is available for consultation in Delhi during some portion of the time that the Government of India is in residence there.

B.—The terms upon which the Legislative Department can be consulted are laid down by the Rules of Business, rule 17 of which runs as follows :—

“ 17. The Executive Department, may consult the Legislative Department on the following subjects, namely :—

- (a) the construction of Statutes, Acts and Regulations ;
- (b) questions on any general legal principle arising out of any case ;
- (c) proposed amendments of the law ; and
- (d) notification to be issued under any enactment :—

Provided that the Legislative Department shall not be asked to advise on—

- (e) cases which are connected with legal proceedings commenced or impending, or which are likely to involve any claim against the Government, or questions connected with the practice and procedure of the courts ,
- (f) cases on which the Advocate-General of Bengal has advised ; or
- (g) cases in which any Advocate-General or any Government Advocate could advise in the ordinary course of his duties and as to which there is no special reason for referring to the Legislative Department ”

There has always been a certain amount of difference in the way these rules have been interpreted which has varied with the personnel of the Department. Sometimes they have been strictly enforced and sometimes a less rigid interpretation has been placed upon them.

During the years 1912—1915 the number of references made to the Government Solicitor, including those dealt with by his Simla representative averaged 182 per annum. The average number of cases dealt with in the Legislative Department have always greatly exceeded this and since the outbreak of the war owing mainly to the large powers taken under emergency legislation which

have required special consideration, references to the Department have steadily increased. In 1913, the last pre-war year, there were 671 cases so dealt with, in 1914, 846 ; in 1915, 881 ; in 1916, 943 ; and in 1917, 1,120. These figures do not include cases of a very urgent or secret character which pass direct to the hands of the officers and are not registered in the office. The figures are not available of the references to the Government Solicitor during

the last two years, but there is no reason to believe that they have materially increased.

The question of the employment of a separate Government Judicial A, June 1914, No. 224. Solicitor, who would be a whole-time officer located with the Government of India, was considered by a Committee of the Executive Council consisting of six members in 1914, and the opinion of the Committee was against any change in this respect. The position has, however, altered considerably since 1914 as appears from the figures quoted above:

The question was further examined by the Law Officers Committee, which sat in the latter part of 1916. This Committee consisted of Sir Basil Scott, Chief Justice of Bombay, Sir William Vincent, the present Home Member, and Mr. S. R. Das, a Calcutta Barrister, now the Standing Counsel to the Government of Bengal. Paragraph 38 of the Committee's Report dealing with the office of Government Solicitor was as follows:—

“38 We are of opinion that the sums now paid to the Government Solicitor by way of extra allowances which aggregate Rs 19,500 per annum might more advantageously be utilized in the payment of a permanent Solicitor to be attached to the Legislative Department of the Government of India. He should in our opinion be a trained Solicitor, a whole-time Government servant on a salary of Rs 1,200 per mensem rising by annual increments of Rs. 50 to Rs. 1,700. The office should be pensionable, say £500, per annum after 20 or 25 years' service. We have no doubt that such an officer would be freely consulted and that he might be of considerable service to the various departments of the Government of India. If, indeed, a competent Solicitor were attached to the Legislative Department, the necessity of consulting the Solicitor in Calcutta would, save as regards offices in that city and litigation, disappear, and the delay attendant on the present practice, would be avoided. We believe also with the increasing amount of work which is done in the Legislative Department that the time of this officer would be fully occupied. His opinion in cases of doubt could be checked by the Law Member and in cases of necessity references could be made to the Advocate-General direct. We believe that such a post with the pension proposed would prove attractive to Solicitors and that there would be no difficulty in securing the services of a thoroughly satisfactory man. The result of such an appointment would be, as stated, to diminish considerably the volume of work coming to the Government Solicitor from the Government of India, though he would still be in Calcutta the Solicitor for the Government of India, Bengal, Bihar and Orissa and Assam. The Government of India work, which must continue to come to him, would be that of departments of that Government located in Calcutta such as:—

- (1) The Controller of Currency.
- (2) Posts and Telegraphs.
- (3) Patents, Designs and Inventions.
- (4) Director of Commercial Intelligence.
- (5) Eastern Bengal Railway.

In the case of the Government of Bihar and Orissa and also that of Assam, it is important that they should have the call on the services of a professional man particularly for conveyancing work."

With these recommendations I am personally in full agreement, except as to the salary which will, I think, have to be considerably higher than that recommended by the Committee. The difficulty at first will be to get a man of sufficient standing and Indian experience to take charge of the work, as it is obvious that a man out from home would be of very little use for the first year or two. The Law Member would have to be responsible for all advice given, and it would be impossible for him to cope with the work unless the Solicitor was a man who had had considerable experience of India Acts and Indian legal problems, and on whom he could rely.

I feel that we shall be forced at the outset to try and get an older man to start the scheme and should have to pay him probably Rs 2,500 a month for three or four years, at the same time taking on a younger man selected in England, to commence at (say) Rs. 1,500 per mensem and rising perhaps to Rs 2,500, and who would after the first three or four years be capable of taking over the substantive post. Having regard to Indian rates of pay generally and the important and confidential nature of the work, I do not think that we ought to offer less than this. It would I think, be quite impossible to get an Indian solicitor to fill this appointment at a smaller remuneration, but I think myself that it would be wiser that the first permanent incumbent of the office should be a solicitor from England.

Under the Secretary and Deputy Secretary, as the Legislative Department is now constituted, we have a Legal Assistant, and I think that it would be possible later on to convert this post into that of Assistant Solicitor, and thus get in a second string in the Solicitor's Department who would be capable of taking the Solicitor's place when he was on leave and might, if he proved suitable, be his successor.

If the scheme matures, the establishment would start with a senior man as Solicitor and an Assistant Solicitor recruited from England. At the end of, say, four years, the Solicitor would retire, the Assistant Solicitor would take his place, and an Indian would be recruited as Assistant Solicitor, the post of Legal Assistant not being filled up when it was next vacated.

There will, no doubt, be some difficulty in getting a man with the experience necessary to initiate the new regime. The ideal arrangements would, of course, be to start with the present Government Solicitor, Mr. Kesteven, as a whole-time officer, but I doubt

if he would accept the post on any terms that we could offer. I think, however, that it might be possible to get a good man from Bombay, but I feel that Rs. 2,500 per mensem is probably the lowest possible salary that would be attractive for so short a period.

The change would, as indicated above, involve some increase in expenditure at the outset, but I do not think that it should be negatived merely on this account, and when the new establishment was once fairly under way I doubt if the salaries-bill need be appreciably larger than at present. Certainly the money would be better spent than it is under existing conditions.

With the reduction in the Government Solicitor's work, which would be effected by the new scheme, I consider that his contract allowance of Rs. 4,000 per mensem could be fairly reduced by

This is in accordance with the recommendation of Sir Basil Scott's Committee, paragraph 39. Rs. 1,000 per mensem leaving him Rs. 3,000 per mensem for his services as Solicitor to the

Governments of Bengal, Bihar and Orissa, and Assam, and for the work connected with the departments which will still be located in Calcutta. We should also probably require to utilize his services as an intermediary where it was thought desirable to lay a case before the Advocate-General for advice, but taking everything into account I think that somewhere about Rs. 3,000 per mensem should be a sufficient remuneration. In Bombay, the Government Solicitor only receives Rs. 2,000 per mensem, but Calcutta rates seem to be generally higher, and it is probable that the Bombay Solicitor's work is less arduous.

Adding to the Rs. 1,000 per mensem (i.e., Rs. 12,000 per annum) which might be so saved, Rs. 19,500 per annum at present allowed to Mr. Kesteven for special attendances at Delhi and Simla there would be a total sum of say Rs. 31,000 per annum available to provide for the new post, and this would go a long way towards providing a permanent Solicitor's salary of Rs. 1,500—2,500 per mensem with a pension of £500 per annum after 25 years' service. The present legal Assistant's pay is Rs. 1,200—1,500 per mensem and that should be more than sufficient to cover the pay of an Assistant Solicitor, who, if an Indian, might fairly begin at Rs. 500 per mensem. The nett result, therefore, after the transition period, during which some additional expense must, I think, be incurred, would not be any considerable increase of expenditure.

I have referred above to the necessity that would arise, at all events in some cases, of consulting the Advocate General. This right we should obviously have to retain, though the frequency

with which the necessity would recur would depend largely upon the calibre and disposition of the Law Member for the time being

Sir Courtenay Ilbert's¹ note seems to suggest that the Solicitor might take the place of the Secretary of the Department, but this, I think, is quite outside the range of practical politics. The work of the Department, quite apart from cases for legal advice, has increased enormously during the 30 years that have elapsed since Sir C. Ilbert retired, and I doubt if he has quite appreciated this. The Secretary in the Legislative Department is also Secretary to the Legislative Council, and during the Sessions both he and the Deputy Secretary have their hands more than full. There is also, besides the Council work, all the drafting of Bills to be done, and a very considerable volume of other departmental work which could not be passed on to the Solicitor.

I think myself that if the change which I advocate is to be made at all, it would be a great advantage to get the new system into working order as soon as possible. In the period immediately succeeding the war, we shall quite possibly be flooded with legal problems and it would be of the greatest assistance to us if we could make some preparations beforehand to cope with them.

There is one other matter to which I should like to refer shortly, and that is as to the drafting of Provincial Bills. So far as Government of India bills go, we can get on fairly well, though we have no trained parliamentary draftsman, and the work is laborious and constantly increasing in complexity. But the drafting of Provincial Bills often leaves much to be desired. Under existing conditions we are able to help them a good deal as all local bills come up to us for consideration before they are passed in the local Councils. This system, however, can hardly continue under any scheme of Provincial devolution, and it seems to me to be of some importance to consider this aspect of the question.

In these days, legislation is complicated and difficult; continuity of form and method is of great importance; the draftsman should be fairly up-to-date in both the British and the Colonial Statute-books; and it seems to be almost essential if any reasonable standard of efficiency is to be maintained that he should be a permanent official. No Provincial Government can afford to keep the necessary staff, and the result is that their work is at times scrappy and haphazard and devised in many cases on a faulty scheme or based on an inappropriate model. A great deal has been done in the past in codifying the more important parts of the English law applicable to India as a whole, and it will, in my opinion, be a great mistake if any avoidable inroads are to be made upon these Acts

¹A former Law Member.

by indiscriminate Provincial variations. There is a very definite tendency on the part of the provinces even now to press for such variations, and in exceptional cases they have been allowed. But our general policy in the past has undoubtedly been to discourage anything of the sort unless strictly necessitated by local conditions. In Madras a similar tendency has manifested itself with regard to the Hindu law, which though unwritten and varying with the different schools, is yet in its broader outlines essentially a law of India. Whether in the future we shall be able to maintain the policy to which I have referred above may be doubtful, but if India is not to degenerate into a series of separate States governed by hopelessly divergent laws, it will at least be desirable that some efforts at uniformity should continue to be made where uniformity is possible.

These considerations all seem to me to point to the establishment of a central parliamentary draftsman's office, efficiently manned with permanent officials. All local Bills might be submitted to the office for scrutiny and advice, and in important cases a draftsman could be loaned to a local Government. The cost of the establishment should be shared by all the Provincial Governments, and perhaps also by the Government of India. Junior officers from the provinces could be trained in the office, and would carry the experience so gained back to their provinces. Continuity, uniformity and up-to-date knowledge would be reasonably ensured, and a good deal of time and labour, which is now wasted, might be saved.

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No. 96.

MONUMENTS MAINTAINED BY GOVERNMENT UNDER
ANCIENT MONUMENTS PRESERVATION ACT, 1904.*(4th March, 1918.)*

I QUITE agree that the issue of a notification under section 3
of the Ancient Monuments Pre-

Department of Education, Proceed-
ings Archaeology and Epigraphy B,
March 1918, No 14

(Legislative Department unofficial
No. 1081 of 1917.)

servation Act does not make
the monument a "monument
maintained by the Govern-
ment under this Act," within
the meaning of section 15 (1).

So far as I can see, the only monuments which would come
within these words are—

- (a) those in respect of which an agreement has been made
between the Collector and the owner under section 5,
when the Collector has by the terms of the agreement
undertaken the maintenance of the monument;
- (b) those over which the Collector has acquired rights under
section 4; and
- (c) those which the local Government has acquired under
section 10.

In both these two last cases the Commissioner has the duty of
maintenance cast upon him by section 11.

By section 15 (1) the public has a right of access to monuments
coming under (a), (b) or (c) of the last paragraph, but it is I think
still only a limited right of access, *viz*, subject to rules, and I think
that any rules could be made which are fairly required for the pre-
servation of the monument. The general rule-making power is
contained in section 23, which authorises "rules for carrying out any
of the purposes of this Act." Preservation of monuments is the
general object of the Act, and I think, therefore, that any rules
would be justified which are reasonably required for preservation.
This test applied in my opinion to rules under section 15 as much as
to any other part of the Act.

If a particular monument does not come under (a), (b) or (c) of
paragraph 2 above, section 15 of the Act gives no right of access
to the public at all.

No. 97.

CONSTRUCTION OF SECTION 86 OF THE GOVERNMENT
OF INDIA ACT AS REGARDS LIMITATION OF PERIOD
OF LEAVE UNDER THE SECTION.*(5th March, 1918.)*

I THINK that the view taken by Secretary of section 86 of the Government of India Act is correct having regard to section 32 of the Interpretation Act. I doubt, however, if the section of the Government of India Act even limits the total of the periods for which leave can be granted to 6 months, and I cannot think that this was an intentional change when the Act of 1915 was passed. It seems to me to be another of those cases of rather careless drafting of which we have noticed several instances. Whether the Home Department will think it desirable to take advantage of what I believe to be a slip in the Act is for them to decide.

Home Department Proceedings,
Establishments Deposit, March 1918,
No 22.

(Legislative Department unofficial
No. 206 of 1918)

No. 98.

LIABILITY OF THE PRINCIPAL FOR DEBTS INCURRED
BY THE AGENT.*(2nd April, 1918.)*

THERE is no doubt of course that a principal is liable for all debts properly incurred by his agents, and that this doctrine would apply as between a principal firm and an agency of such firm. But I am not satisfied that this general statement of the law is sufficient to justify the proposed distributions. Mr. Hardy's statement that sums vested in the Custodian can be attached in accordance with law must be read subject to the provisions of section 9 (2) of Act XIV of 1915. Before the Government of India would be justified in authorising the proposed distributions out of the head office assets, they must be satisfied first that the liabilities of the agencies were incurred within the proper scope of their authority, and secondly that the funds from which payments are to be made are not legally earmarked for other purposes. It may well be that Mr. Mellor can satisfy Commerce and Industry Department on both these points, but I think that some caution is necessary in the matter as the principal liability of one of the agencies concerned is said to be for refunds of premia, for which the principals may or may not be liable; and on the other hand one of the funds which it is proposed to utilise is said to be a sum deposited with the Bank of Bombay as security for the payment of policies, upon which it is at all events possible that policy holders have a prior lien.

The proposal to apply funds belonging to certain hostile firms in discharge of the liabilities of other hostile firms cannot of course be sanctioned. It is opposed to the doctrines of international law, and could only be done if agreed to at the peace conference.

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No. 99.

RAILWAY RECEIPTS AS INSTRUMENTS OF TITLE: THEIR
TRANSFERABILITY.

(3rd April 1918.)

Railway Department Proceedings,
Traffic A, April 1918, Case No. 953-
T-16-5-7

(Legislative Department unofficial
No. 23 of 1918.)

I REGRET the delay in noting
on this file. The work of the
Legislative Council session came
before I had time to deal with
it, and it was snowed under.

The question involved is a difficult one. We must consider not only the interests of the Railway Companies but those of the public, whose servants the Companies are. It has been fairly established by the Privy Council case that railway receipts are in fact "used in the ordinary course of business as proof of the possession or control of goods or as authorising or purporting to authorise, the owner to receive or transfer the goods." This being so, it seems to me that it would be difficult for us to legislate merely to declare that Railway receipts are *not* "instruments of title," although that may have been the intention in 1888. To do so would, I think, be to disregard facts. At the same time, in view of the difficulties to which Railway Companies may be put by the recent exposition of the 'aw, I think that some measure of protection must be accorded to them. The problem is to find a *via media* between the opposing interests. I am personally inclined to think that the best solution lies in making railway receipts assignable in the same way and to the same extent only, as an actionable claim now is (*see* Chapter VIII of the Transfer of Property Act). This would be, as the Advocate General says, the simplest way of dealing with the case, and would not, so far as I can see inflict any undue hardship on consignees. A form of transfer might perhaps be printed at the back of the railway receipts with a notice warning consignees that a transfer could only be effected in this way, and that it would not be binding upon the Railway Company until notice of the transfer was given to them. It would however be for the Railway Companies to consider whether this would afford them sufficient protection, and how such transfers would affect them in practice.

I agree that legislation is the only safe way of dealing with the case, but the form that this should take will require very careful consideration. Commerce and Industry will have to ascertain the views of the Railway Companies, and will no doubt consider the question also from the point of view of the public. Probably they will desire to consult Local Governments.

No. 100.

EFFECT OF THE REPEAL OF THE UNITED PROVINCES MUNICIPALITIES ACT, 1900 UPON THE CHAKRATA CANTONMENT LAW.

(17th April, 1918.)

THE POINT is a curious one and it is more curious that it should never have been definitely con-

Army Department (Quartermaster General's Branch) (Q M G-4) Proceedings Cantonments, Taxation B., September 1918, Nos. 648-49 and Appendix.

(Legislative Department unofficial No. 298 of 1918).

sidered before. I think, however, on the whole that Secretary's view is correct. The application of section 187 of the United Provinces Municipalities Act of 1900 to the Chakrata Cantonment was, I

think, substantive legislation for that cantonment, such legislation being authorised by section 23 of the Cantonments Act of 1910. The *form* of Legislation authorised was in effect legislation by reference, but it was exactly equivalent to repeating in the notification the provisions of section 187 of the United Provinces Act with such modifications as were required. I do not think therefore that the repeal of the United Provinces Act had any effect on the Chakrata Cantonment law, and that section 187 of the repealed Act as applied by the notification still remained part of the substantive law of the Cantonment. It would however no doubt be better to substitute for it the corresponding provision of the new Act, though this is not in any way necessary.

No. 101.

PLACE OF ACCRUAL OF INCOME FOR PURPOSES OF TAXATION UNDER THE INDIAN INCOME-TAX ACT.

(19th April, 1918)

THE question is a very difficult one, but on the whole I think that Secretary's view is the correct one. I feel no doubt that the question whether income arises or accrues in British India cannot depend upon whether it is payable in sovereigns or rupees. The test applied by Fry, J., in the case cited by Secretary would seem to make the expression used in section 3 of our recent Act equivalent to "received or receiveable." or at all events to confine our right to tax to income which the owner either actually received or had a right to receive in British India. The question under consideration in the English case was, however, not the same as that with which we are concerned here. What Fry, J., was considering was merely whether particular income accrued or arose to a particular person: what we have to consider is *where* it accrued or arose. I think, however, that the test may well be the same in both cases, and that income not actually received by a person but which he has a right to receive in British India is within Section 3 of our Act, but that if he only has a right to receive it in England, for instance, it will not be taxable. I am not quite sure that the adoption of this principle may not hit the present practice of taxing interest payments on rupee loans where the promissory note has been "enfaced for payment in England." If this enfacement is to be treated as part of the contract with the payee, he would apparently have no right to payment in India and the interest would not be taxable. It would be otherwise if the enfacement is merely for his convenience.

Finance Department Proceedings
Separate Revenue A., June 1918,
No. 323.

(Legislative Department unofficial
No. 319 of 1918)

No. 102.

IMPOSITION OF EXPORT DUTY ON INDIAN RAW PRODUCTS AND RESTRICTION OF IMPORTS FROM ENEMY COUNTRIES.

(30th April, 1918.)

I AGREE with the last sentence of Sir George Barnes' memorandum, but I do not think that this policy can be carried out by a system of export duties the objections to this are pointed out in the third paragraph of the Memorandum, and seem to me to be unanswerable. I also doubt whether Indian opinion would stand a general imposition of export duties with this object. At the same time we *must* come in to some scheme whereby the Empire should have first call on all essential raw products exported from India, and I feel that considerable pressure may be put upon us to give a similar though modified preference to our present allies. Neutrals would seem to have no particular claim upon us, unless a policy of starving our present enemies is adopted, which I venture to think would be a mistake, even if we were in a position to enforce it. To attain the object of supplying the Empire first, I think some scheme such as Sir George Barnes has outlined will be necessary. All that we can do in India is to consign the required quota to British buyers through some agency to be set up in England (or in the case of colonial buyers, in the Colony) whose duty it will be to see to the distribution. In the same way, if we are to give a next preference to ally countries, we must be told what their requirements are, and they must arrange for the distributing agencies giving us a fair guarantee that the goods will be used or consumed by themselves. The main difficulty, as it seems to me, will be about prices. If the market is to be restricted, there must obviously be some machinery for fixing a fair price. If a preferential call on Indian produce is given to British consumers, they will almost certainly expect to get the goods cheap, and as India can only be an importer of raw materials to the most limited extent, there will be no sort of reciprocity. It is however in no way essential to the object in view that British buyers should be supplied cheap, and would this be fair to the Indian producer. Presumably therefore a board of some sort will have to be set up out here to fix a minimum price for each commodity. This will no doubt increase the difficulties of the scheme, and may cause a good deal of friction, but it seems to be unavoidable, and I think that we ought to proceed.

¹ Commerce Member.

for a free hand in this direction. It would of course be open to the Indian seller to bargain within the limited market for anything more than the minimum price, and there might, in the case of some commodities at all event, be sufficient competition to make this of value. It would also be beneficial to us—if the second preference is to be given to the allies—that their market should be an open one *inter se*, i.e., that general quota should be fixed for all the allied countries and not individual ones for each. If a system of minimum prices, and not fixed prices, is adopted, I presume that the quota to be furnished by each seller would also have to be allocated by the Board, but this need not cause any great additional difficulty. I think that any scheme of restricted markets will be unpopular in India and that we should try to mitigate the restrictions as much as possible, and should certainly hold out for reasonable terms.

With regard to imports, I agree generally with what is said in the memorandum, but I think that a good deal will depend on how far we are to be allowed the same fiscal autonomy in India as will be enjoyed by the Dominions, and that if we are asked to come into any Imperial scheme for restriction of imports from enemy countries we should press for corresponding liberty in other cases where our own interests are affected.

No. 103.

DRAFT BILL TO AMEND THE BRITISH NATIONALITY
AND STATUS OF ALIENS ACT, 1914.*(Points for consideration by the Indian representatives to the Imperial Conference.)**(1st May, 1918.)*

Home Department Proceedings
Public A., July 1919 Nos. 120—143.
(Legislative Department unofficial
No. 381 of 1918.)

I THINK we must furnish
the delegates with a brief in
case the subject does come
up for discussion.

I doubt if it is any good instructing them to press for an alteration of the *jus soli* as the basis of the law, but I think that we should certainly press for the right to denaturalise a person who has become a British citizen merely because of the *jus soli*. Just as an infant can under these circumstances on attaining majority make a declaration of alienage, so we ought to have the reciprocal right of denaturalising him.

I also doubt if the Home Government will agree to the simple solution for the constitution of the committee suggested by Deputy Secretary, though it would of course suit us very well. The expression "high judicial office," though undefined, is not a very great stumbling block, and would not at all be affected by the appointment of a High Court Judge. "Superior Court" has no meaning in India and we should certainly prefer "High Court." It is only the definite article before the words "High Court" in clause 1 (3) of the Bill that is inappropriate to India. Possibly the new provision which it is proposed to insert in section 8 (1) of the Act might run "and a High Court or Superior Court of the Provinces for the High Court."

No. 104.

EXAMINATION OF THE PROVISIONS OF SECTIONS 185,
526 AND 527 OF THE CODE OF CRIMINAL PROCEDURE,
1893 AS REGARDS TRANSFER OF CASES FROM ONE
HIGH COURT TO ANOTHER

(Question of competing prosecutions in different High Courts).

(6th May, 1918)

I THINK that this is a case where we must legislate. Section 185 is both difficult to construe and, in my opinion, ill-devised, and I only wonder that it has stood so long.

If only one prosecution has been instituted, I do not think that any further powers are necessary than those conferred by sections 526 and 527. If a transfer within the province is necessary, it can be made by the High Court under section 526. If a transfer to another province is necessary, it can be made by the Governor-General in Council under section 527. If it is thought undesirable to multiply cases under section 527, the amended section might allow the High Court, if it thought proceedings ought not to go on in its jurisdiction, to stay them for a reasonable period to enable the prosecutor to go to a Court having jurisdiction in another province, holding the accused in the meantime under arrest (if necessary) or on bail.

If two or more competing prosecutions have been instituted in different provinces, I think that the only reasonable rule is to say that the High Court within whose jurisdiction proceedings were first started should decide whether or no the prosecution should continue under its jurisdiction, and that if it decided this question in the affirmative the other prosecutions should *ipso facto* be stayed. It is very unlikely that there would be three prosecutions started in three different provinces, but if it were so and the first High Court decided against the prosecution in its province, I presume that the same principle would have to be applied as between the other High Courts.

The present rule which enables an accused person by change of residence to put the decision into the hands of a High Court within whose jurisdiction no prosecution has been launched, seems to me to be absurd.

I would not fetter the High Court by whom the decision is to be made in any way. I would leave it to decide on any grounds which it considered material, whether the prosecution in its jurisdiction should go on or not. I agree with the majority of the Full Court in the Calcutta case that convenience is a legitimate ground for interference under the existing section.

It would, in my opinion, be altogether wrong that one High Court should have power, whether by implication or otherwise, to transfer a case to itself from another High Court or *vice versa*, or to decide which of two other High Courts should try a particular case.

No. 105.

REVIEW OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL OF THE GOVERNOR GENERAL FOR THE YEAR AND THE QUESTION OF VOTING BY GOVERNMENT OFFICIALS.

(8th May, 1918.)

THIS is a very interesting review, and I think it will be useful if it is continued at least yearly.

Proceedings Deposit, September 1918, No 16. The figures shew that the business of the Council is increasing steadily, and if we are in the near future to have a considerably enlarged Council we must, I think, be prepared for longer and more arduous sittings. Even now it is apparently difficult for many of the officials of the Government of India to attend at all consistently during the debates, and their benches are often conspicuous by their emptiness. Several Indian members have referred to this in conversation with me, as evidence of the hollowness of the whole thing, and I confess that I have been much impressed by it. For instance on one occasion Mr. Sastri¹ devoted some part of his speech to criticizing the recommendations of the Public Services Commission as to the appointment of the Director of Agriculture. There was no one representing the Department present in Council at the time, and Sir William Vincent in replying could only say that he knew nothing whatever about it. On the occasion of another resolution moved by Mr. Sastri, the Government front benches were, for a time at all events, absolutely empty; the second row was represented only by Sir James DuBoulay, who was acting as "Member in Charge," and the back row by Mr. Rose and Colonel Caruana.²

The Session was also memorable for the division on clause 4 of the Income Tax Bill which was lost mainly by the votes of Government of India officials under the aegis of His Excellency the Commander-in-Chief. I am myself all in favour of open voting whenever it is possible, but I venture to think that it was carried too far on this occasion. Where a measure has been approved by Government, as was definitely the case on this occasion, I think it should be understood that all the members of the Government are bound to support it on a division even when open voting in the Council is allowed. I would myself go even further than this and apply the same rule to Secretaries, who constitutionally represent the

¹Mr. (now Right Honourable V. S. Srinivasa Sastri)

²Judge Advocate General.

Government of India and are in fact the heads of the various departments of the Government of India. I think that they ought not in such a case to vote against Government. If their chiefs are committed publicly to a particular policy it seems very difficult for them to dissociate themselves from it to such an extent. Unless this rule is observed I cannot see how the solidarity of the Government as a whole is to be maintained. I do not in the least regret what happened on this particular occasion, as I think that the incident has served more than one useful purpose, but at the same time I feel that the principle to which I have referred may be of great importance on future occasions.

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No. 106.

CONSTRUCTION OF THE EXPRESSION "LASCAR OR OTHER NATIVE SEAMEN" IN SECTION 115 OF THE INDIAN MERCHANT SHIPPING ACT, 1859.

(9th May 1918.)

I must confess to some doubts as to the correctness of Dr. Kenrick's opinion that the expression "Lascar or other native seamen" in section 115 of the Act of 1859 includes all seamen of Asiatic birth, and therefore apparently Chinamen and Japanese. If this is so, it is certainly rather odd that both this section and part IV of the Act of 1883 should concern themselves solely with the return of such seamen to some port in *India*. So far as I know, the word 'lascar' is of Indian origin and applies only to Indian seamen, and I should have thought that this would be especially the case when it is used in an Indian Act. It seems however, that Commerce and Industry Department are committed to the wider and perhaps more convenient view which Dr. Kenrick has taken and assuming it to be correct, I agree that there is no legal objection to the proposed stipulations.

Department of Commerce and Industry Merchant Shipping A., Proceedings June 1918, Nos 1—9.

(Legislative Department unofficial No. 398 of 1918).

A. M. S., March 1913, Nos. 1—9

A. M. S., January 1914, Nos. 1—4.

¹ This Act has since been repealed by Act 21 of 1923.

² Dr. G. H. B. Kenrick, Advocate General, Bengal.

No. 107.

CONSTRUCTION OF REFERENCES TO REPEALED STATUTES SUBSEQUENTLY RE-ENACTED BY A NEW STATUTE.

(10th May 1918.)

THE EFFECT of the amendment made in section 30 of the General Clauses Act by Act XXIV of 1917 was to provide that where an Ordinance made under section 72 of the Government of India Act, 1915, was repealed and re-enacted, orders made under the repealed ordinance should be deemed to have been made under the re-enacting Act. This would seem to cover the point as from September, 1917, when Act XXIV of 1917 was passed, *unless* it were held that this only applied to Ordinances repealed after the passing of Act XXIV of 1917. We can also rely on the general rule of construction, to which Secretary referred in his previous note, that where a provision of a repealed statute is re-enacted by a new statute, references in any of our Acts to the repealed statute must be read as references to the re-enactment, though it is difficult to find any direct authority for such a rule—except perhaps common sense! On the whole therefore I am not satisfied that the Winding-up Order of 22nd July, 1916 is not now in full force. But I recognize that the issues at stake are very large, and that we should take no risks in such a matter; I would therefore at the instance of the Secretary of State specifically validate the Winding-up Order and all things done under it. But at the same time I think we should press the Secretary of State to amend the Government of India Act, 1915, by providing that all references in Acts of the Government of India to provisions of the statutes repealed and re-enacted by the 1915 statute should be deemed to be references to the last mentioned statute. This is I think clearly the proper way of dealing with the matter, and the only safe method of curing the various difficulties that may arise in the future. The section quoted by Secretary from the Merchant Shipping Act of 1894 is a precedent for such an amendment.

Probably it would be best for us to draft the reply to the Secretary of State's telegram, and also to Burma which might be on similar lines.

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No. 108.

POWER OF LEGISLATION FOR SERVANTS OF THE CROWN
IN NATIVE STATES QUESTION WHETHER THE
POWER IS EXCLUSIVE OR CONCURRENT WITH THE
RIGHTS OF THE NATIVE STATES

(23rd May 1918.)

Foreign and Political Department,
Proceedings Internal A., March 1919,
No 58.

(Legislative Department unofficial
No 46 of 1918.)

THIS file incidentally raises
rather a big question, and one
which I think merits careful
consideration.

By section 65 (1) (b) of the Government of India Act, 1915,
Parliament has given us power to legislate for all servants of the
Crown in Native States This power dates back at all events to the
Act of 1861, but whence exactly Parliament itself got the power,
which is a very exceptional one, I do not know. In some cases it
may have been by treaty of grant, but I assume that in most cases
it is by usage or sufferance, or
has been assumed by the Crown
as part of the prerogative of the
sovereign.

The question involved in this case is whether this power is an
exclusive one or merely concurrent with the rights of the Native

See paragraph 1, page 4 *ante*.

European British subjects and

See page 5, Indian Political Practice,
Volume I.

Native Indian subjects of His
Majesty in Native States. In
the case of European British
subjects I believe the policy has
always been to treat the power of legislation as exclusive. in the
case of native Indian subjects, on the other hand, I believe (though

I am not sure) that it has been
treated as concurrent only.

S. I., September 1917, Nos. 1—3,
notes page 4.

With regard to servants of the
Crown I do not know what the practice has been, and I think that
this can only be ascertained from the records of the Foreign and
Political Department. If we have not in the past allowed Native

I. B., June 1903, No. 333, notes page
12.

States to legislate concurrently
with us for servants of the
Crown within their territories

(and I confess that this seems to me to be the most probable view), we should, I think, certainly pause before we lightly give away the principle now. It would be part of the prerogative of the Crown which we certainly ought not, and probably have not the power, to waive without definite authority. I think that this aspect of the question certainly deserves further consideration by the Foreign and Political Department. I should be ready to discuss it with Sir John Wood if he so desires.

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No. 109.

PANCHAYAT COURTS QUESTION OF LIMITATION.
JURISDICTION AND RULE OF EVIDENCE.*(30th June 1918)*

I ALSO agree generally with Deputy Secretary's note I do not think we need object to the Department of Education Proceedings Local Boards, October 1918, Nos 1—2. prescription of a simple general rule of limitation for suits in panchayat courts (clause 31), and 3 years is reasonable. I (Legislative Department unofficial No 577 of 1918)

object strongly to a definite exclusion of the Evidence Act All courts should, I think, be bound by at least the general principles of the Act. I agree with Sir Wilham Vincent¹ in thinking that the jurisdiction of these new courts should not be exclusive, at all events at first. The policy should be to try and give people confidence in them and encourage their use, but not to shove them down their throats by insisting on exclusive jurisdiction I am afraid that there is a good deal of truth in Deputy Secretary's criticisms of the village courts under the Act of 1892, and I cannot believe that it would be wise to give them exclusive jurisdiction. I shall however, be interested to hear what Sir Harcourt Butler's² views are on the subject

¹ Home Member.

² Education Member.

No. 110.

(I—II.)

CONFERMENT OF EXTRA DIOCESAN POWERS ON THE
BISHOPS OF MADRAS AND BOMBAY.

I.

(1st July 1918)

THIS case bristles with difficulties. There can, I think, be no doubt that India possesses legislative institutions of her own within the meaning of the Privy Council judgment in the *Colenso* case (*in re* the Bishop of Natal, 3 Moore, P. C. cases, N. S. page 115) and, therefore, that unless the case of India can be distinguished in some way from that of Natal (though I am unable at present to see how) the Crown has no power, independently of the provisions of an Act of Parliament, to give jurisdiction to any Bishop in India whether he is what we call a Statutory Bishop or one less formally recognised by the State

In the judgment referred to the Lord Chancellor (Lord Chelmsford) says .—

"After a Colony or Settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or Settlement as it does to the United Kingdom.

It may be true that the Crown, as legal head of the Church, has a right to command the consecration of a Bishop, but it has no power to assign him any Diocese, or give him any sphere of action within the United Kingdom. The United Church of *England* and *Ireland* is not a part of the constitution in any Colonial Settlement, nor can its authorities or those who bear office in it claim to be recognised by the law of the Colony, otherwise than as the members of a voluntary association."

It would seem to follow from this judgment that the Indian legislature has, subject to any statutory restrictions, the power to do what the King cannot do, and that our legislative powers are sufficient to effect what the Metropolitan wants, though whether this method of procedure will meet with his approval or not is another matter. The King's ecclesiastical authority by Letters Patent being confined to such powers as Parliament has given to him, it seems clear that under section 115 of the Government of India Act, His Majesty can by Letters Patent only prescribe the functions and

jurisdiction to be exercised by the Bishops of Madras and Bombay "within their respective dioceses", and it seems to me to follow from this that no jurisdiction outside these limits can now be conferred by Letters Patent.

If this view is correct its affirmance would seem to lead to the somewhat extraordinary result that the powers granted by the Letters Patent of 1912 were, or at all events would be now, *ultra vires*. The Act of 1915 itself gives the Bishop of Calcutta his extra-diocesan powers, but it cannot, in my opinion, be read as authorizing the King by Letters Patent to give any extra-diocesan powers to either of the other two Statutory Bishops. The Indian Bishops Act of 1842 no doubt recognized the power of the Crown to do this, and it may well have been a correct assumption then, as I doubt if it could have been held in 1842 that India had an independent legislature sufficient to oust the prerogative of the Crown, and in any event Colenso's case had not then been decided. But the position is very different now, and I cannot help thinking that this was why the Act of 1915 did not reproduce the provisions of section 4 of the Act of 1842. It is possible that the question was not examined in detail when the Letters Patent of 1912 were drawn up, or it may have been thought that section 4 of the Act of 1842 which was then in force was sufficient to justify the procedure.

In my opinion therefore what the Metropolitan wants cannot be done by any alteration of the Letters Patent so long as the existing provisions of the Government of India Act of 1915 stand, and that in order to enable the Crown to do this the necessary authority must be granted by Parliament, *i.e.*, the Statute must be amended. On the other hand, we probably have power ourselves to legislate and to do all that the Metropolitan requires. We cannot of course touch section 115 (2) of the Statute (it is not one of the sections covered by Schedule 5) which makes the Bishop of Calcutta Metropolitan, but we can, I think, provide for a Provincial Commissary to act for him during his absence. I doubt if the Metropolitan will approve of this course, but I also doubt very much if we should ask for an amendment of the Government of India Act under existing circumstances, or if it would be the slightest use our doing so.

If there is anything in my suggestion, that the 1912 Letters Patent are or may be invalid, we ought to take up the question with the Secretary of State and suggest that the Law Officers should be asked to consider the point, and also to advise us whether we can ourselves legislate in the direction the Metropolitan desires. In this last connection the provisions of section 84 (a) of the Government of India Act may be material.

I should be very grateful if Secretary would peruse this note and record any further suggestions which he may have to make upon it. This subject is, I think, one which requires the fullest consideration.

II.

(3rd July 1918.)

I AGREE that it is doubtful whether we can legislate and I think that we should not do so without consulting the Secretary of State. The whole subject of ecclesiastical jurisdiction is a most thorny one.

Department of Education will no doubt consider whether it would not be desirable in view of the difficulties of the case to ask the Metropolitan whether he wishes to press his request.

His Excellency as head of the Ecclesiastical Department should, I think see, but probably the papers will have to go to him in any case.

No. 111.

CIVIL ANNUITY FUNDS

(4th July 1918)

THE MAIN question has been discussed at considerable length and with much ability in the preceding notes, and I have no desire to go over any of the same ground again. I agree that the case should be laid before the Secretary of State for his ruling, and probably he will desire to consult the Law Officers at home. I will only add that there is in my opinion nothing in the Act of 1874 to indicate that the Civil Annuity Funds ceased to exist. All that the Act provides for is the transfer to the Secretary of State of the accumulated capital of the Funds and the liabilities incumbent upon it. Section 2 refers to subscriptions being paid to "the said Civil Annuity Funds," after the acceptance of the transfer by the Secretary of State, and this would seem to imply their continued existence. It also clearly grants statutory rights to pensions to all such subsequent subscribers, and the question would seem to resolve itself therefore into one of fact, *viz.*, whether present members of the Indian Civil Service have in fact so subscribed. If they have I think that their pensionary rights are governed by the Statute.

I desire also to refer to a passage in paragraph 2 of Sir William Vincent's note which I have marked A in the margin. I feel very doubtful whether an Indian court at all events would specifically enforce a contract not to accept other employment in India after the termination of a non-pensionable engagement. Any covenant to this effect would seem to run some risk of being held to that extent void under section 27 of the Indian Contract Act.

No. 112.

QUESTION OF TAXING SIMLA HOUSE ALLOWANCE
GRANTED TO THE GOVERNMENT OF INDIA ESTAB-
LISHMENT.*(10th July 1918.)*

I FEEL considerable difficulty about this case I have no doubt that the particular allowance in question was in the mind of the Finance Department when we were discussing the drafting of sections 3 (2) (1) of the Income-tax Act but I certainly did not then realise the difficulties that had to be met.

Finance Department Proceedings
S. R. A, August 1918, Nos. 348—349.
(Legislative Department unofficial
No. 491 of 1918.)

We are in this reference only concerned with the object with which the allowance is granted and not in any sense with the question whether it ought to be so granted or not.

What Finance Department now propose to tax is the particular allowance granted for a particular year, and the question under the Act is for what purpose this particular allowance is made. It does not necessarily follow that it was granted in the particular year with the same object that it was originally granted, but, accepting Sir William Vincent's note, I think we must assume that it is granted in the present year for the objects to which he refers, *viz.*, those embodied in the 1906 despatch

Home Department Proceedings Establishment A, September 1906, Nos. 67—72

which seems to be the latest pronouncement on the subject. Reading the material paragraphs of this despatch together, it seems to me that the object of the allowance was to provide for the maintenance of a second, and from the point of view of the grantee unnecessary, residence for clerks in Simla in order that they might perform their duties there during the period that Government was in session. Paragraph 7 of the despatch seems to suggest that in 1906 Government accepted the position that it was desirable that clerks should maintain their permanent residences in Calcutta but that for the purposes of their duty they should be brought up to Simla, and that the expenses of their residence there should be paid by Government either by way of allotting quarters to them or granting them a house allowance. If this was in fact the object with which the allowance was originally granted, and if in the absence of any further declaration of Government's intentions it must be assumed that this is still the object of the grant despite the changed conditions. I think

that it was and is a grant specifically made to meet expenses wholly and necessarily incurred in the performance of duties, and that it is within the exemption of the Act. Whether under existing circumstances a grant with these objects is justifiable or not, is in my opinion, entirely foreign to this reference. But this question certainly seems to need further consideration

I should like to add that I should be personally very willing to see this problem referred for solution to the courts. It is a purely domestic question which I think the Government of India ought to decide for themselves. I also feel that at the present time, when the expenses of living have gone up so considerably and undoubtedly press hardly upon many of our poorer employés, this would not be an opportune moment to withdraw any existing concession even if it were not strictly within the purview of the Act.

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No. 113.

QUESTION WHETHER SUBJECTS OF NATIVE STATES ARE "FOREIGNERS" WITHIN THE MEANING OF THE FOREIGNERS ACT, 1864 AND OF THE FOREIGNERS ORDINANCE, 1914.

(13th July 1918.)

Foreign and Political Department
 Proceedings Secret Internal A., August
 1919, Nos. 26—29.

(Legislative Department unofficial
 No 625 of 1918)

THIS seems to raise a question of which I have always been rather afraid. Would not our Courts be bound to hold the same under many of our Acts ? For instance, are not subjects of Native States "foreigners" within the meaning of the Act of 1864, even as now amended, and consequently also under the Foreigners Ordinance, 1914 ? If the Secretary of State is taking this question up with the Colonies, is it not likely that he would wish us to put our own house in order ? If I am correct in the view I have taken above, I think that Foreign and Political Department may like to consider this aspect of the case further.

No. 114.

QUESTION OF JURISDICTION OF LOCAL GOVERNMENT
OVER THE DECISION OF THE FINANCIAL COMMISSIONER OF BURMA.*(22nd July, 1918)*

If I WERE merely asked whether the action of the Local Government in overruling the decision of the Financial Commissioner was right, I should have no hesitation in advising that it was not. Under the Land Revenue Act and Rules the decision of the Financial Commissioner was, I think, final, and I cannot read section 3 of the Act of 1888, as giving the Local Government any power as a court of appeal from him. It does not, however, necessarily follow that the Government of India should interfere on the Parsi gentleman's petition, as there can be little doubt that the result of the Local Government's action is that substantial justice has been done, and it will be for Department of Revenue and Agriculture to consider whether they are prepared to abide by the consequences. If Mr Broocha sues the Secretary of State for damages for having in effect deprived him of the points of his purchase (and I think that an action of this nature could be devised) it will probably be thrown out on the ground that such an action would involve a decision as to the validity of the sale to him, which is barred by section 56 of the Land Revenue Act. The case, however, might be taken up to the Privy Council and argued on the lines of the *Moment* case. Whether Revenue and Agriculture would be willing to face this possibility will be for their consideration. Personally I should not be sorry to see the *Moment* case re-opened in the courts, and if it is to be, a case of this kind, where at all events abstract justice would seem to be clearly on our side, may not be a bad one for the experiment. But, on the other hand, it must be remembered that the law point as to the power of the Local Government to set aside the Financial Commissioner's decision is, in my opinion, equally clearly against us. On the whole, I should be inclined to let the Local Government's decision stand, and let them stand the racket. We are, I think, not bound to overrule them even if they are in our opinion technically wrong, where the result is that substantial justice has been done.

MC42LD

No. 115.

QUESTION WHETHER DESERTION FROM THE PORTUGUESE ARMY IS AN OFFENCE AS DEFINED IN THE GENERAL CLAUSES ACT, 1897.

(6th August, 1918)

I THINK that Secretary's view is the right one. The question turns on the definition of "offence" in the General Clauses Act [section 3 (37)]. It is there defined as "any act or omission made punishable by any law for the time being in force." This must, I think, mean "any law... in force in *British India*," and would not, therefore, cover desertion from the Portuguese Army, an act which if committed in British India would not be punishable by British Indian law.

Foreign and Political Department
Proceedings Internal A, October 1918,
Nos 1—2.
(Legislative Department unofficial
No. 664 of 1918.)

No. 116.

(I—II.)

PROPOSED AMENDMENT OF THE WORKMAN'S BREACH
OF CONTRACT ACT, 1859.

I.

(6th August, 1918.)

IN THE absence of any definite proposals for amendment, I should ordinarily content myself with endorsing the views of my Hon'ble Colleague in the Home Department, as it seems clear on the one hand that the Act should not be merely repealed, and on the other that the Pandit is a broken reed. It seems, however, that the reference is probably intended to elicit our views as to the lines of amendment generally. On this I am in general agreement with Secretary's proposals, but personally I would go a little further. I do not like the Act which I feel no doubt is misused in many ways, but a summary method of dealing with the difficulties which exist in connection with the employment of labour in many parts of India seems to be still an unfortunate necessity. I doubt, however, if it goes beyond the cases of recruitment on a large scale, usually away from home, and is essentially bound up with the prevailing system of advances in such cases.

I would myself make the penal provisions applicable only to contracts of service in writing and in a form approved in every case by the local Government. This would enable them to be confined to cases of recruited labour, and to advances of limited sums which were reasonably capable of repayment out of, say, a year's wages. All recruitment for labour on a large scale ought to be (if it is not already) under supervision and there should be no difficulty in seeing that the employee understands the conditions of the contract. It would of course only be willful default on the part of the employee that would be penalised.

The option in section 2 of the Act should certainly be the court's and not the employer's, and the period for which the employee could be ordered to work should, I think, be limited to a year.

The court should also have discretion to give time for payment and to fix reasonable instalments.

I think that the court should also have discretion to allow compensation in the case of frivolous or unfounded complaints,

and that the complainant should be bound in all cases to deposit a substantial sum for the purpose before process is issued. Seeing that the employer would in every case be a man of means this would entail no hardship on him.

I would also at the same time provide a penalty for enticement which seems to be at the root of most of the evils disclosed in the replies from local Governments.

II.

(18th June, 1919.)

I do not like the Act any more than Sir George Barnes,¹ but I think as we have got it we ought to keep it in some form. I think Rs 300 (which seems to have been agreed upon at the meeting of 21st April 1919) is unnecessarily high and I should prefer to see it reduced to Rs 200. In the case of men engaged for a year at say Rs 50 per mensem an advance of Rs 200 would be more than sufficient. I should also like to see the operation of the Act confined to imported labour. I agree with Sir George Barnes and Sir Sankaran Nair² as to amendment 3. I do not think that a preliminary enquiry is desirable. I am sorry that it has not been found practicable to insist on written contracts even where the engagement is for a period over one month but I do not wish to press this point.

¹ Commerce Member.

² Education Member.

No. 117.

FLYING OF BRITISH FLAG WITH A SPECIAL DEVICE BY
VESSELS OWNED BY RULERS OF NATIVE STATES.*(Interpretation of sections 69, 73 (1) and 734 of the Merchant Shipping Act, 1894)**(7th August, 1918.)*

IF SECTION 73 (1) of the Merchant Shipping Act, 1894, is applied by section 734 to Native State vessels, and under section 73 (1) such vessels are formally authorized to fly the red ensign defaced with the badge of the State, I feel no doubt that the mere use of this flag will not make the vessel liable to forfeiture under section 69. The section itself provides that two things are necessary to subject a ship to this penalty, viz., (1) using the flag, and (2) assuming the British national character (1). If unauthorised would obviously be evidence of (2), but if (1) is authorised and enjoined upon the owner of the vessel, it clearly would be no evidence of (2). The mere use of the flag therefore under the new conditions could not, in my opinion, subject the vessel to the penalty. If in addition to using the flag, it pretended to be a British vessel, it might no doubt bring itself within the section, but this is quite another matter. I cannot say in

**Cf.*, page 4 *ante*.

answer to Commerce and Industry's question* that authorisation of the use of the flag would make the vessel "immune from the penalty": I can only say that the use of the flag would not subject it to the penalty. This is, I think, the view already adopted

†Secret I., February 1917, Nos. 21—25, correspondence, pages 5—6.

by the Government of India in paragraph 4 of its despatch† of 2nd February 1917, and is no doubt the view accepted by the Secretary of State.

No. 118.

PROPOSED AMALGAMATION OF THE JUDICIAL COMMITTEE AND THE HOUSE OF LORDS INTO ONE IMPERIAL COURT OF APPEAL.

(29th August, 1918.)

I DO NOT think that we need consider the question of an All-India Court of Appeal as the Secretary of State has not referred to this in his telegram, though I know that it was in his mind last cold weather. It is a difficult subject on which there would be much difference of opinion.

I have always hoped to see an amalgamation of the Judicial Committee and the House of Lords into one Imperial Court of Appeal. I think Indian litigents would probably gain by it. Not infrequently in the past it has only been possible to constitute a very weak committee for Indian Appeals owing to the superior claims of the House of Lords. In one session of the Judicial Committee I remember we had only Lord Shaw, Sir John Edge and Mr. Ameer Ali sitting, and complaints were considerable, while for Canadian Appeals at all events a really representative committee was always constituted. The Judicial Committee has recently found it necessary to sit in two divisions owing, I believe, largely to the stress of Prize Court work, and it would no doubt be necessary to provide that the Imperial Court of Appeal could sit in two or more divisions. We should, I think, press for a statutory minimum of four judges, of whom one should always be a Judge of Indian experience. Looking back over the reports both in the Judicial Committee and the House of Lords I find that less than four has been unusual, and that six or seven Judges have often sat together.

There should, I think, be three salaried Judges with Indian experience. They need not necessarily have been Barrister Judges, out here or even Judges at all. Neither Lord Hobhouse, who presided for many years at the hearing of Indian Appeals, nor Sir Andrew Scoble, had been on the Bench in India. One of the three should, I think, be an Indian. The appointment should certainly not be for life but for 5 or 7 years. It is eminently desirable that fresh blood should be introduced from time to time, and men who have passed their prime are no more valuable in a Court of Appeal than elsewhere.

The salary should be sufficient to attract the best men. £400 a year seems to me hopelessly inadequate though it must be remembered that at present it carries with it a Privy Councillorship. This, however, will not necessarily be the case under the new régime, Sir John Edge has told me that the £400 does not even pay his

expenses of coming to London for the sessions. The salary should in my opinion, be the same as that of Members of the Secretary of State's Council.

And an representatives need not be, I think, restricted to sitting in Indian cases, though no doubt this would be the ordinary rule. Sir Richard Couch, Sir Arthur Wilson and Sir Andrew Scoble, and probably other Indian Judges, used frequently to sit in the Judicial Committee to hear cases from the Dominions. It would of course be for the Lord Chancellor to settle who should sit in any particular case.

Members of the Court from India should, I think, be appointed by His Majesty on the recommendation of the Viceroy.

At present the judgments of the Judicial Committee are delivered by one member of the Committee only, as they are in the form of advice to His Majesty. I think, however, that the House of Lords practice should be adopted under which each Lord is entitled to deliver judgment. This often leads to greater light being thrown upon obscure points of law, and dissenting judgments (which are by no means rare) are frequently of great value.

The question of criminal appeals is no doubt a difficult one, but it will probably have to be dealt with upon the same lines in regard to India as with regard to other parts of the Empire. If criminal appeals are allowed to the new Court from the Colonies, there would be no reason to bar them in the case of India. I should prefer myself to see it a purely civil court, leaving all criminal appeals, whether under the Letters Patent or by special leave to be dealt with by the Privy Council as the proper body to advise His Majesty on the exercise of his prerogative. If criminal appeals are to go to the new Court, the Letters Patent of the Indian High Courts will need revising. I think that a Committee of the Privy Council will still be necessary to deal with non-litigious questions which may be referred to them for advice, of which a recent Indian example was a petition by Sir Basil Scott, Chief Justice of Bombay, as to the

Judicial A., March 1912, Nos. 87-88. proper interpretation of a particular clause of the Letters
Judicial A., March 1913, Nos. 91-92. Patent. If something in the nature of a Judicial Committee

must still remain for cases of this sort, I should prefer that they should continue to deal with criminal appeals, with regard to which they have laid down a very definite and salutary line of policy.

I agree with Sir William Vincent¹ that it might be useful to consult an informal committee of lawyers during the coming session of our Legislative Council. I think the question is one of such importance that we ought to consult non-official opinion, and I have no doubt that our action in doing so would be appreciated.

¹ Home Member.

No. 119.

QUESTION WHETHER ADDITIONAL SESSIONS JUDGES,
WITH CIVIL JUDICIAL FUNCTIONS COME UNDER
SECTION 98 AND SCHEDULE III OF THE GOVERNMENT
OF INDIA ACT, 1915.

(30th September 1918)

I CANNOT think that an additional Sessions Judge is less an
"Additional Sessions Judge"

Home Department Proceedings Es-
tablishments A, December 1918, Nos.
152—155.

(Legislative Department unofficial
No. 919 of 1918).

because he has also to perform
certain civil judicial functions.
It is of course possible that
Lord Crewe¹ in 1912 did not
think that the new appoint-

ments would fall within the schedule to the Act of 1861 which was
then in force, but it seems to me more likely that all he intended
was that two of them should be made available for non-Indian Civil
Service Indians under the powers conferred by the Government of
India Act, 1871 (new Sect. on 99 of the Act of 1915). I can only say
that the argument from the language of the despatch is not sufficient
to convince me that the appointments referred to were not within
schedule III of the present Act. If they had been of "Additional
Subordinate Judges with the powers of Sessions Judges," instead
of the other way about, it would have been a different matter.
I regret the inconvenience which the adoption of my view will
entail, but I cannot think that we should be safe in advising other-
wise. It may of course be possible to refer the point to the Secretary
of State and he may be prepared to take the responsibility of the
more convenient point of view.

¹Secretary of State for India.

No. 120.

QUESTION OF AMENDING THE GENERAL CLAUSES ACT,
1897 IN REGARD TO VALIDATING THE ENEMY TRADING ORDER

(Validity of rules made under an ordinance superseded by an Act.)
(8th October, 1918.)

I DON'T think there is anything in the point. We do not strictly speaking re-enact an ordinance but re-enact its provisions by an Act. The General Clauses Act only "continues" orders, etc., made under the repealed Ordinance in virtue of the re-enactment of these provisions. It is in fact only a saving of labour. Under the new enactment the orders could be re-issued and the General Clauses Act merely says that they shall be deemed to have been so re-issued. The point is a purely technical one and does not amount even from the technical point of view to an infringement of the Statute. We do not purport to say that the ordinance shall be in force for longer than the statute allows but merely that something we have done under the ordinance shall be deemed to have been done under the new enactment.

No. 121.

QUESTION OF LEGALITY OF THE LEVY OF LICENSE FEES
IN THE FORM OF TAXES IN CHAKRATA CANTON-
MENT.*(9th October, 1918.)*

I AGREE that nothing is gained by long disquisitions in the administrative department on Proceedings A, October 1919, Nos. 91—99. legal questions which must come up in any event to this Department. It will be sufficient in the future if the administrative department will indicate to us shortly any legal difficulties which they see in the course proposed and leave us to deal with them.

Section 174 of the Cantonment Code, if brought into line with the later provisions of the United Provinces Act, will, I think, be sufficient to meet what is required by the Chakrata cantonment, and this should be put to the Local Government. It is, in my opinion, no objection to the use of section 23 of the Cantonment Act, 1910, that an enactment which it is proposed to extend to a cantonment contains possible elements of taxation. There is nothing in the section to suggest that it can only be used in cases to which section 15 has no application.

I am, however, as at present advised, not prepared to subscribe to the view previously recorded in the Department that licence fees of this sort should be regarded as taxes, and I think the question may need to be reconsidered. Any difficulties would be largely met by amending section 24 (20) of the Cantonments Act so as to make it clear that licences may be required and fees imposed by rule and I agree with Deputy Secretary that this should be done at the earliest opportunity.

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No. 122.

**QUESTION WHETHER THE PROVISIONS OF SECTION 30
OF THE GOVERNMENT OF INDIA ACT PRECLUDES
THE LEASING OF A BUILDING FOR A POST-OFFICE
IN A NATIVE STATE.**

(31st October, 1918)

THERE is in my opinion, nothing in Section 30 of the Govern-
ment of India Act, 1915 which
(Legislative Department unofficial No. 1003 of 1918). precludes the leasing of a
building for a Post Office in
a Native State. There would however be no power to take such a
lease in the name of the Secretary of State. The lease must, I think
be taken in the name of some responsible officer of Government,
and all the formalities required by the Native State Law to validate
the transaction must be observed.

No. 123.

RIGHT TO TAX BRITISH SUBJECT INDEPENDENTLY
OF HIS PLACE OF RESIDENCE.

*(Consideration of the correspondence from the Assistant Minister in
the Nizam's State.)*

(6th November 1918)

I AGREE. I think Mr. Holland's ¹ criticisms on the Resident's
Foreign and Political Department proposed reply are reasonable.
Proceedings Internal A., December The main points are (1) to
1918, Nos 15-16. disclaim any desire to tax the
(Legislative Department unofficial Nizam's subjects, and (2) to
No 1028 of 1918.) emphasize our admitted right
to tax our own subjects wherever resident. As to the means which
may or may not exist for enforcing in any area outside British India
our lawful demands upon any of our own subjects who may be
recalcitrant, the question is not likely to arise and may well be left
for discussion until a concrete case occurs. I think it would be
well to refuse to discuss this question at length, and while not
agreeing to all that the Assistant Minister says on the subject, to
intimate politely that if the question should ever arise in a concrete
form the views expressed by him will receive full consideration.

¹Foreign Secretary.

No. 124.

DISCLAIMERS IN PATENT LAW

(23rd November, 1918)

This is not, I think, a case in which we can advise, but like Secretary, I should like to be of assistance to my honourable colleague if possible. Personally I should deal with the matter on common sense lines. The Controller is of course perfectly right in thinking that a particular combination of old ideas may be patentable, and that it is no objection to the granting of a patent for such a combination that one of the "old ideas" in question is already subject to a prior patent. It is in fact common knowledge that A can patent a process which involves the use of B's patent, but in such a case the later patent will of itself give no right to the use of the article or process the subject of the prior patent. If therefore (as is apparently the fact in the present case) the later patentee is willing that his patent should contain an express disclaimer of any right to use the prior patent, and the owner of the prior patent wishes that this should be done, it is only reasonable that effect should be given to his wishes. The Controller says in effect that this is not necessary: that if A attempts to use B's prior patent it may be left to the courts to decide between them, especially as he seems to have some doubt as to the validity of the particular prior patent. It is however always desirable to close the door to litigation where possible, and if it is the fact that A is willing to have the disclaimer inserted, I think that common sense dictates the propriety of this being done. Disclaimers are well recognized in Patent Law, and though it is impossible for us to examine the English authorities, I cannot conceive that there can be any legal objection to the insertion of a disclaimer by consent of parties.

No. 125.**QUESTION WHETHER A DECREE OF THE EGYPTIAN COURT IS ENFORCEABLE BY EXECUTION PROCEEDINGS IN BRITISH INDIA.***(7th December 1918.)*

It is, I think, sufficient for us to say that a decree of the Egyptian Court cannot be enforced by execution proceedings in British India. Mr. Barron's¹ letter correctly states that the only means by which such a decree can be enforced here is by a substantive suit brought in British India upon the decree.

Home Department Proceedings
Judicial A, January 1919, Nos. 237—
244
(Legislative Department unofficial
No. 1118 of 1918)

¹ Chief Commissioner of Delhi.

No. 126.

THE NECESSITY OF CONSULTING BEFORE PRESENTATION OF AN APPEAL THE LAW OFFICER WHO WOULD ARGUE THE SAME

(13th December 1918)

PERSONALLY, I am not in favour of this proposal. In the first place the important thing to my mind is that the particular law officer who is to argue the appeal should be consulted before it is presented. In the second place I think that uniformity is important in this matter.

Home Department Proceedings
Judicial February 1919, Nos. 128-129.
(Legislative Department unofficial
No 1134 of 1919).

With regard to the first point, it is obvious to me that the Legal Remembrancer, who *ex-hypothesi* never practices or has practised in the High Court, is not so well qualified to judge of the chances of success of a particular appeal, as the officer whose every day duty it is to do so. I don't know much about the Public Prosecutor in Sind, but the Government pleader in the High Court is always a pleader of great experience and in nine cases out of ten the most able of all the practising Vakils. He is, therefore, eminently qualified to advise on such a question, and it is, in my opinion, of great importance that he should have been consulted before the appeal is presented. It would no doubt be desirable that the Legal Remembrancer should examine the case first and prepare the papers for the Government Pleader, and this would seem to meet the suggestion that the latter is too busy a man to go into the cases thoroughly. It would no doubt only be in a case where the Legal Remembrancer advised an appeal that Government would press the matter, and it would only be in such cases that it would be necessary to consult the Government Pleader.

In the case of appeals against decisions of the Presidency Magistrates the same considerations would apply. If the Government Solicitor thought that an appeal was desirable he would consult either the Advocate-General or the Government Pleader whichever he proposed to brief, and you would not have the undesirable position of counsel appearing in support of an appeal which he thought ought never to have been brought.

With regard to the second point, it may be that the Legal Remembrancer in Bombay is an exceptionally capable officer, though he certainly has not always been so in the past, but if an exception is made in his case it will be very difficult to refuse to make similar exceptions in other provinces, and the result will be that the old system, which was in my opinion extremely unsatisfactory, will be allowed to remain.

No. 127.

SECTION 56 OF THE INDIAN CONTRACT ACT, 1872 AND THE
ANALOGOUS PROVISION IN THE ENGLISH LAW.*(Mr. Prosser's letter.)**(20th December 1918)*

I understand that the Department of Commerce and Industry are only concerned in this reference with the particular cases dealt with in Mr. Prosser's letter. It would of course be impossible to advise on the specific liability of the jute firms without knowing exactly what the provisions of their contracts were, but dealing with the only point which appears to be raised by this letter, which says "the difficulty arises with reference to the exports which were prevented during the time the prohibition was in force," I think we may say that section 56 of the Contract Act will afford Mr Prosser's client at least as much protection as section 3 of the Courts (Emergency Powers) Act, 1917. Whether they will have as good a defence in respect of any period after the prohibition was removed, may be a different question dependent partly on the terms of the contracts, and partly on the question whether shipment after September the 27th was in fact possible or not. But this is not the question which worries Mr Prosser as is shown by the next sentence in his letter after the one quoted above.

So far therefore as the particular case goes there appears to be no need for further legislation in India. But it is of course clear that the English section goes much further than section 56 of our Act, in that it makes compliance with the advice or direction of a Government Department a good defence to an action for breach of contract. There are however no facts before me to suggest that there is any necessity for legislation here to provide for cases of this nature. The other letter on the file from Messrs Thornton is only in general terms.

With regard to the draft reply to the India Office, I suggest that if it is only Mr. Prosser's letter which has to be considered it would be better to answer the case which he puts more specifically, instead of comparing our section 56 with the English enactment in general terms.

No. 128.

PROPOSED DRAFT OF THE LETTERS PATENT CREATING
A HIGH COURT IN LAHORE.*(8th January 1919)*

Now that we have got a clean-cut provision in section 113 of the Government of India Act, 1915, for the establishment of additional High Courts I think we should get away, if possible, from the recitals of the old Acts. If we continue on the lines of the recitals in the Patna Letters Patent they will only get more and more complicated and there will be nothing gained. All that appears to me to be strictly necessary is to recite (1) the powers conferred by section 113, (2) the constitution of the Province or Provinces for which the High Court is to be established, and (3) the fact (if it is so) that no part of such Provinces is included within the jurisdiction of any existing High Courts. I place below a draft of the recitals and first clause of the Letters Patent which is, in my opinion, sufficient, but it is of course not for us to draft in these cases and it can only go home as an indication of the lines upon which we suggest that the India Office draftsmen should work.

The constitution of the Provinces concerned causes some little difficulty as the North-West Frontier Province and the Delhi Province have both been carved out of what was the original Punjab. It is moreover curious to find that all they did in 1859 was to appoint a Lieutenant-Governor, and not specifically to constitute a Province.*

*A copy of the Proclamation of 1859, which is now on the file, shows that this is not quite correct. A Lieutenant-Governorship was established over "the Punjab, the tracts commonly called the 'Trans-Sutlej States,' 'Cis-Sutlej States,' and the 'Delhi territory.'"

G. R. L[OWNDES].—15-2-19.

So far as I know the actual boundaries of the Province have never been declared, as can be done if necessary under section 60 of the Government of India Act, 1915, which is of course only a reproduction of pre-existing powers. The local Government can no doubt tell us if this view is correct. If the boundaries have been declared at any time it would probably be desirable to recite the fact.

It would, I think, in any case be necessary to recite the constitution of the North-West Frontier and Delhi Provinces, for as I understand the position, the new High Court will be the High Court in every sense for the Delhi Province and will also exercise ordinary original criminal jurisdiction in respect of European British subjects, etc., in the North-West Frontier Province.

The second Delhi proclamation of 1915, also causes a little difficulty, as under it territories were added to the Province of Delhi which had formerly been part of the United Provinces and therefore no doubt subject to the jurisdiction of the Allahabad High Court. Under the Indian High Courts Act, 1865 (28 and 29 Vict., c 15), section 3, it was competent to the Governor-General in Council to transfer a territory from the jurisdiction of one Chartered High Court to that of another, but the statute did not authorize the transfer from a High Court to a Chief Court, as was done in this case, and no action could, therefore, be taken under the Statute. We have, however, always assumed that the Government of India has power *by legislation* to transfer territory from a Chartered High Court to any other Court created by themselves, and this view has been confirmed by the Privy Council in [*Emp. vs. Burah* (I. L. R.) 4 Cal., 172].

*I see from the noting at the time that this was the intention. See Home Department Judicial Proceedings for March 1914, Nos 284—287.

We must, I think, assume that this was done by the Delhi Laws Act, 1915 (VII of 1915) *, with the result that from and

after the passing of that Act the transferred territories were no longer under the jurisdiction of the Allahabad High Court, and therefore a bare recital that none of the territories for which the new High Court is to be created are included within the limits of the local jurisdiction of any other High Court would seem to be sufficient. In view of the rather vague provisions of the Delhi Laws Act, 1915, I should prefer not to recite it in detail.

I should be very unwilling to accept clause 12 in the form suggested. It was no doubt necessary in the case of the Patna High Court, which was being carved out of the Bengal jurisdiction, and it may also have been desirable for similar reasons in the case of Allahabad. If I understand the present position, however, there is no intention to confer upon the new High Court at Lahore any greater jurisdiction than is now exercised by the Chief Court, the sole object of the change being to raise the status of the Chief Court to that of a High Court. It should, therefore, in my opinion, be sufficient in clause 12 to provide that the High Court should have the same jurisdiction in respect of infants and lunatics as was previously enjoyed by the Chief Court. The suggested provision giving the new High Court similar jurisdiction in these matters to that exercised by the Calcutta High Court seems to me to be unnecessarily vague, and to open the door to possible questions of fact as to what jurisdiction the Calcutta High Court does in fact exercise and upon what its claims to such exercise are based.

I agree with Joint Secretary that clause 15 should include the North-West Frontier Province, as the new High Court will exercise

in the ordinary course original criminal jurisdiction over European British subjects. It will not exercise extraordinary original criminal jurisdiction outside the Provinces of the Punjab and Delhi, and no reference should therefore be made to the North-West Frontier Province in the other clauses coming under "Criminal Jurisdiction".

There can, I think, be no reason to confer any Admiralty jurisdiction on the new High Court, and clauses 24 and 25 of the Patna Letters Patent may therefore be omitted, as was done in the case of Allahabad.

Clause 35 of the Patna Letters Patent is also of course not required but I think it may be desirable to empower Judges of the new High Court to sit in places other than Lahore in case anything in the nature of circuit proceedings should be found desirable at

any time. This was provided for by clause 24 of the Allahabad Letters Patent and clause 31 of the Bengal Letters Patent, and I see that Mr. Shadi Lal provides for it by his clauses 33 and 34.

It is also provided for in the Patna Letters Patent.

S R HIGNELL.

I agree with the proposed modification of clause 40 to which Joint Secretary refers

It must, I think, be remembered that it will be necessary to abolish the existing Chief Court as from the date of the new High Court coming into existence. This should, I think, be done by anticipatory legislation in the local Council with our sanction. It appears to me, however, that we shall have to legislate on similar lines with regard to the Delhi Province, and this may be urgent if the new High Court is to come into being in April next.

Some provision will also have to be made for cases already instituted. There appears to be no necessity to incorporate transitory provisions of this nature in the Letters Patent, as was done in the case of the Patna High Court. Probably it will be sufficient to provide by legislation in India that all such cases shall be deemed to have been instituted in the High Court and shall be continued in it.

Whether, if my Hon'ble colleague accepts the new recitals which I suggest, Home Department will be prepared to telegraph them home in full I do not know, but possibly it might be sufficient in the telegram to say that we suggest that there is no necessity to follow the recitals of the old statutes as was done in the case of Patna, and to send home by post, a full copy of the new recitals as merely indicating the lines on which we think the Letters Patent should be drafted. If this is done it might be as well to get a clean draft of the whole of the new Letters Patent. This, however, is a question for the Home Department.

No. 129.

RETROSPECTIVE EFFECT OF LEGISLATION.

(Question of retrospective application of section 6 of the Provident Fund Act, 1897.)

(10th January 1919)

The question asked us is "whether retrospective exemption (Legislative Department unofficial is *intra vires* of section 6 of No. 1185 of 1918) Act IX of '97", and I propose to confine myself strictly to answering this.

There can be no doubt that *legislation* may be given a retrospective effect. But the presumption is always against it except where the alteration made in the law affects procedure only (See per Lord Blackburn in *Gardner v. Lucas*, 3 Appeal Cases, 582, at page 603). The presumption may be rebutted by the express words of the Act, or by necessary implication, as to which see the *Queen v. Mayor of Maidenhead*, L.R. 9, Q.B.D. 494.

This doctrine, in my opinion, applies equally to powers exercised under a law, *e.g.*, the power to apply an Act to some matter to which it does not apply *proprio vigore*. The power must be construed strictly in accordance with the Act which creates it, and unless retrospective application is within the power it cannot exist. If the Act itself applied to the particular object, the presumption would be as above, and the presumption must, I think, equally apply if the Act merely gives power to an outside authority to apply it.

In the present case section 6 of the Provident Funds Act, IX of '97, empowers the Governor General in Council to apply the provisions of that Act to Provident Funds of a certain class, but there is nothing in the words of the Act or inherent in the subject matter to suggest that the application may be retrospective. In my opinion, therefore, retrospective application is *ultra vires*. It is true that the purpose of the proposed retrospective application is to give relief to the object, so that its invalidity would not be likely to be attacked, but I doubt if this is a question which can legitimately be taken into consideration. Moreover it is obvious that by making deposits unattachable [see section 4 (1)] existing rights of creditors may be prejudiced.

I was anxious to see if the view I have taken in this case was in accordance with the previous noting in this Department. I have

therefore examined all the cases available, and I find that it is so.

*Public Works Department Proceedings Civil Works—Irrigation, June 1879, Nos. 31-32

†Home Department Proceedings Public, March 1888, Nos. 8-11.

‡Finance Department Separate Revenue A Proceedings May 1909, Nos 339-340

§Foreign and Political Department Internal A, February 1890, Nos 48-108

||Foreign and Political Department Internal A., July 1888, Nos 367-373.

¶Foreign and Political Department Frontier A., August 1898, Nos. 125-126

**Foreign and Political Department Frontier A., May 1901, Nos. 26-29.

(See U. O. No. 2023* of 1879, U. O. No. 99† of 1888, U. O. No. 403 of 1891, U. O. No. 27 of 1909 and U. O. No. 204‡ of 1909). The four cases in which notifications with retrospective effect have been passed were all cases in which the issue of the notification was in effect the exercise of an independent power of legislation vested in the Governor General in Council (See U. O. No. 699§ of 1889, U. O. No. 402|| of 1888, U. O. No. 299¶ of 1898, and U. O. No. 169** of 1901.)

There is, I see, one very recent case in addition to those above cited, namely, U. O. No. 1156 which did not come on to me owing to my absence at the time. The concurrence of the department in this notification seems to have been due to *vis major*, but may perhaps be defensible on the ground that the retrospective form of the notification is only a ratification by the Governor General in Council of a previous appointment by his Agent. The case, however, is very near the line.

No. 130.

PROHIBITION OF EXPORT OF GANJA AND BHANG UNDER
THE SEA-CUSTOMS ACT, 1878.

*(Position of British Post Offices in French territory in Madras under
the Indian Post Office Act, 1898.)*

(21st January 1919.)

The Post Office Act purports to be applicable to Native Indian subjects of H. M. in Pondicherry, and *prima facie* a notification under section 25 clothing officers of the Post Office with particular powers would be well enacted in the case of officers of the Post Office in Pondicherry who were Native Indian subjects of H. M. It is within our power by legislation to clothe them with such powers, and we have apparently done so. Whether this would be effective in French territory, *i.e.*, whether the French authorities would allow them to exercise these powers, may in many cases be doubtful. But in the present case we are told that they will not object. I am unwilling to throw any doubts upon our powers of extra-territorial legislation within the limits prescribed by section 65 of the Government of India Act, 1915, and I should therefore prefer to let the reference in Draft II to Pondicherry and Karikal stand.

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No 131.

APPLICATION OF "RESTRICTION ORDER" AND "SETTLEMENT ORDER" IN RESPECT OF GIPSY TRIBES IN THE UNITED PROVINCES

(30th January 1919)

Home Department Police Pro- I agree generally with the
ceedings A. A. 200 of 1915, Nos 70-73 course of action proposed by
(Legislative Department unofficial Joint Secretary.
No 58 of 1919)

It is the first point raised by Sir William Vincent¹ which causes most of the difficulty. I am not prepared to say that the action previously taken in 1913 and 1915 was *ultra vires*. It is clear, however, that there cannot be both a "restriction" order and a "settlement" order in force at the same time in respect of the same people. Under the orders of December, 1915 there is a settlement order in force in respect of all members of the gipsy tribe, and the United Provinces now want to make a restriction order in the case of some of them. Before this can be done, the general order of December 1915 must be varied and the persons whom it is now desired to restrict taken out of it and subjected to a new order. But if a restriction order is now to be applied to these members of the tribe the local Government cannot go back, as they desire from time to time to the settlement order. They will again have to vary the order to be now issued by taking those whom they may desire to settle out of the restriction order and applying the settlement order to them. The position will be that a settlement order will be applied to those now in settlements and a restriction order to those now outside the settlements, whom it is desired to restrict.

Having regard to the action already taken, I do not see any difficulty in making the new restriction order apply to members of the tribe in a particular area or to restricting such members to the area in question.

With regard to the second point raised by Sir William Vincent, I do not see how we can advise the Home Department to go back upon the decision of 1913 notifying all gipsies as a criminal tribe.

As to the question of livelihood under section 12 (b), it is for the Home Department to say whether they are satisfied that the means of livelihood are sufficient. Personally, I should hesitate to say that I was satisfied that an indefinite number of persons of this class could reasonably earn a livelihood in every police district in the province. There may be a demand for labour in India generally, but I am quite unable myself to say that there is an indefinite demand for criminal tribe labour in each individual district of the United Provinces.

¹ Home Member.

No. 132.

INTERPRETATION OF THE EXPRESSION "ANY LAW OF INDIA" IN SECTION 177 OF THE ARMY ACT

(14th February 1919.)

The point referred to in Joint Secretary's note is a curious

(Legislative Department Proceedings one I can find nothing to
A, March 1919, Nos 56-57) elucidate the meaning of the

expression "any law of India", and I am not prepared to differ from his opinion that it may sufficiently cover local laws. At the same time it is to be noticed that the antithesis in section 177 of the Army Act is between "in India" and "outside India", and this seems to me to suggest that a "law of India" may be intended to mean something more than a law which is valid only in a particular part of India. Under the definition [section 190 (21)] India includes Native States, and it is therefore impossible to have a territorial law applying to the whole of India, though it looks a little as if the expression "law of India" was intended to mean a law passed by the Governor General of India compare, for instance, section 156 (8). If the expression in question is to be read as covering local laws, it would seem to follow that the Government of a Native State could make any law of that State applicable to officers or men of any force raised by them when serving either in British India or any other part of the world. The result would in effect be that territorial laws of any part of India could be made to follow a force raised in that part wherever it might be serving. This might lead to a position of some difficulty and I think that in addressing the local Government their attention should be called to this, and that they should be told that the Government of India have some doubts as to the validity of such a provision. Having regard to the fact that this particular provision is already in the existing law I doubt if we can go further than this. We have not, so far as I know, seen a copy of the Law Officer's opinion on the point recently referred to them, and I do not know therefore, how far they would be prepared to go under section 177 of the Army Act.

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No. 133.

POWER OF LOCAL GOVERNMENT TO FILL CASUAL VACANCIES IN HIGH COURT JUDGESHIP.

(*Question of appointing a temporary successor to Sir Ali Imam during the period of the latter's absence on leave.*)

(9th February 1919.)

If Sir Ali Imam¹ retires from the 12th, it is in my opinion clear that an appointment can be made to fill that vacancy. If he does not retire but merely continues to be absent I think on the whole that it is within the competence of the local Government to make a second appointment upon the appointment of Mr. Manuk being cancelled, but I admit that the point is not altogether free from doubt. The Interpretation Act applies and I do not think that a contrary intention appears in the Government of India Act, 1915. A statute should, if possible, be so interpreted "*ut res magis valeat quam pereat*". The intention is, I think, clearly to empower the local Government to fill casual vacancies temporarily, and the maxim to which I have referred seems to be apposite.

¹Judge of the Patna High Court.

No. 134.

THE DEED OF CESSION FROM KEONTHAL STATE IN RESPECT OF CERTAIN LANDS FOR RAILWAY PURPOSES.

*(Question of securing similar cession from the Rana of Koti).**(7th April 1919.)*

I am not at all happy about this case. There seem to be several difficulties involved.

With regard to Keonthal, a deed of cession has been executed by the Manager of the State, but the cession is not in the form* which has been adopted for railway lands, as it certainly ought to have been. It seems a pity that we were not consulted before the matter was completed.

Foreign and Political Department
Secret Internal Proceedings, June 1920,
Nos. 17-18.

(Legislative Department unofficial
No 259 of 1919.)

*Internal A, May 1899, Nos. 74—77.

Secretary suggests that "the agreement should be amplified". By this, I presume, is meant that the instrument should be cancelled and another cession made according to the correct formula. This, I think, is certainly desirable, but if the question was one of an ordinary legal conveyance there would be some difficulty in carrying out this proposal, as the rights ceded would no longer be in Keonthal, and a somewhat complicated form of recitals with a supplementary grant would have to be prepared. It may be, however, that in dealing with a political case it will be thought sufficient to cancel the document and execute a new one in its place.

I feel bound, however, to draw attention to the fact that the cession in question is merely one by a British Officer appointed as Manager of the State to the British Government. If the rights ceded were those appertaining to a private estate owned by a subject of British India, this would probably be impossible. An application would have to be made to the Court, which would be bound to consider whether it was for the benefit of the minor or not, and he would probably have an opportunity of re-opening the matter when he came of age. It may be, however, that it is considered sufficient in a political case to dispense with all such formalities, but if the minor protests when he comes of age and can make out a good case on the merits, I doubt if he could in equity be held bound by the present arrangement.

The Rana of Koti, who is a major refuses to make the cession required of him, and it is proposed that the necessary jurisdiction should be taken from him by an act of State. I do not question that this can be done, nor do I in any way question the policy of it. I am only doubtful by what means it should be effected, and how the exercise of jurisdiction so assumed can be provided for. There must be, I understand, various precedents for acts of State of this kind in the case of railway lands, and the Political Department can no doubt tell me how acts of State of this character have been effected in the past. Presumably it must be in some way in the name of His Majesty, and it may be that a Proclamation should be issued. This was, I think, the procedure adopted when the Gaekwar of Baroda was deposed, and also in the Manipur case, though these were of course much more important matters.

It also seems to me to be open to doubt whether a forcible assumption (as this must be taken to be) of jurisdiction *in invitum* would bring the case within the recital of the (Foreign Jurisdiction) Order in Council of 1902, which refers only to jurisdiction which His Majesty has "by treaty, grant, usage, sufferance and other lawful means". If the case does not come within "other lawful means", the provisions of the Order in Council as to the exercise of jurisdiction would have no application. By the ordinary rules of construction the doctrine of *ejusdem generis* would apply, and I doubt, therefore, if "other lawful means" would include an act of State. An instance of the application of these words is to be found in Sir Andrew Scobles'¹ Minute No. 30 of the 25th August 1887, but I have not been able to find anything in our records elucidating this question. It may be, however, that the Political Department can throw some further light on the matter, and I should be glad if they would consider it from the point of view to which I have referred.

¹ A former Law Member.

No. 135.

(I—II)

GIVING OF EVIDENCE ON HIS OWN BEHALF BY AN ACCUSED PERSON.

I.

(8th April 1919)

I do not think that we ought to proceed with this proposal under present conditions. The Rowlatt Committee have undoubtedly "queered our pitch," and

Home Department Judicial A., edly "queered our pitch," and
Proceedings, June 1919, Nos 222—235 proceedings on the Rowlatt

(Legislative Department unofficial Bill in Council have prejudiced
No. 357 of 1918) the case, though I believe that
had the concession been made

earlier as to no presumption being drawn against an accused who refuses to give evidence on his own behalf, there would have been more support for clause 12 of the Bill. It is with considerable reluctance that I am forced to the conclusion that the proposal should be dropped, as I believe that at all events in the High Courts and Sessions Courts things are quite ripe for the change which I have no doubt would be a great improvement in our law. If Part I of the Rowlatt Act is used we may get the advantage of seeing the new provision tried before an exceptionally strong Court, which should have some educative effect.

II.

(8th May 1919)

The second sentence of paragraph 3 of the draft does not in my opinion correctly represent the attitude of the Council. I should like to add at the end of this sentence 'though we have reason to believe that with the modification which was introduced subsequently, providing that no adverse inference should be drawn against an accused person from the fact that he declined to give evidence on his own behalf, the opposition would have been less marked,' or something to this effect. Subject to the suggested modification of paragraph 3 I accept the draft despatch.

My Hon'ble Colleague's remarks above do not weaken my faith in the desirability of enabling an accused person to give evidence in his own behalf. The reason why in India statements by an accused person in his own favour are not generally believed is *because* they are not made upon oath and cannot be tested by cross-examination. I have however while at the Bar known more than one instance where an accused person's statement has carried conviction of its inherent truth and has resulted in his acquittal.

No. 136.

POWER OF LOCAL LEGISLATURES TO AFFECT THE
POWER OF REVISION OF CRIMINAL CASES BY HIGH
COURTS.

(Proposed legislation by the local legislature of the United Provinces affecting the power of revision by the Allahabad High Court of criminal cases decided by Panchayats.)

(11th April 1919.)

I agree that the points referred to above may be dealt with	in the official letter and that
(Legislative Department Proceedings	sanction may be accorded
A, May 1919, Nos. 37—43.)	generally under section 79.

I feel some doubts whether a local legislature has power to say that there shall be no revision of criminal cases decided by panchayats by a High Court. I am not clear as to what powers of revision the Allahabad High Court would have apart from the Criminal Procedure Code, but I believe that their Letters Patent give them some powers of revision which the local legislature could not affect. I think, therefore, that the provisions of clause 62 of the Bill may require further consideration.

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No. 137.

(I—VIII.)

PROPOSED DRAFT OF SCHEDULE III OF THE GOVERNMENT OF INDIA ACT.

(Appointment of the Secretary and the Deputy Secretary in the Legislative Department from the Indian Civil Service or otherwise. Reservation of Judicial posts for members of the Bar). Sir George Lowndes' minute of dissent to para. 13 of the Despatch.

I.

(11th April, 1919.)

I doubt if there is any particular reason why either the Secretary or Deputy Secretary of this Home Department Proceedings Department should be an Indian Civil Service man. No Establishment A., March 1920, Nos 336—408 (Legislative Department unofficial No. 1066 of 1918.) doubt it would always be desirable that one or other should have had administrative experience. And if suitable men are available for the posts from the Indian Civil Service it is a great advantage that both of them should have had such experience. The two paramount considerations however to my mind are, (1) that it should be possible to select for either post the best man available whether from the Indian Civil Service or outside, and (2) that there should be a reasonable prospect of continuity in the office. I know very little about the requirements of other Departments of the Government of India, but I am convinced that in this Department continuity is essential. If, as might well happen, there were a new Member, a new Secretary and a new Deputy Secretary the chances of the Government of India getting the best out of the department would be very small, and changes both of policy and method might be very disadvantageous. I cannot conceal from myself that continuity is less likely when both Secretary and Deputy Secretary are Indian Civilians, as they will naturally in many cases go to other appointments, which would not be so easily available to men recruited from outside. But at the same time I recognize that it would be very difficult to appoint an Indian Civil Service man to (say) the Deputy Secretaryship if the post were not in the schedule. Having had the advantage of serving with two (if I may say so) extremely capable Indian Civilians, I naturally do not want to put any difficulties in the way of future appointments of a similar character, and I should therefore be prepared to retain both posts in the schedule as they are now, provided greater elasticity for outside appointments could be allowed for under section 100. It would, for instance, be impossible under it to appoint

a home lawyer to either post, and it probably would not have admitted of the appointment of Sir John Macpherson¹. If Schedule III to the Act could be divided into three parts, and the strict provisions of section 100 only made applicable to posts in parts 1 and 2, the desired result could, I think, be attained, as the Secretaryship and Deputy Secretaryship in the Legislative Department might be placed in part 3. It might possibly be an advantage in some other departments (*e.g.*, Finance) to be freed from the restrictions of section 100, which could be arranged for in the same way. The only alternative to this would be to provide that either the Secretary or the Deputy Secretary in the department must be a member of the Indian Civil Service, leaving the second post open to outsiders. This would probably necessitate an amendment both of section 98 and of the schedule, and in view of the difficulty to which I have referred above I think on the whole, that the amendment first suggested would be preferable.

II.

(29th August 1919.)

I know very little about the detailed posts referred to or the necessity for earmarking them for the Indian Civil Service. I agree that, inasmuch as in the past such a statutory reservation has been made, it would probably prejudice future recruiting if the reservation was abolished. I think that it is desirable to cut down the list of reserved posts as much as possible in view of the new conditions, but if the present proposals are regarded as a minimum, I am quite willing to accept them. I notice however that Part II of the draft schedule proposes to reserve (as I read it) all posts of District and Sessions Judges and Additional District and Sessions Judges. This seems to be inconsistent with the recommendation of the Public Services Commission (paragraph 14) that 40 posts of District and Sessions Judge should be filled from the Bar.

III.

(6th September, 1919.)

Mr. Hailey² has been kind enough to bring this file over to me and to explain the position. My fear was lest, if the schedule was kept in its existing form, it would be said that the Commission's

¹ A former Secretary in the Legislative Department.

² Finance Member.

recommendations as to judicial appointments was not to be binding on the Government of India. Mr. Hailey tells me that the question of the reservation of judicial posts for members of the Bar in India, and the number of posts to be assigned for this purpose is to be taken up immediately, and he thinks that a supplementary telegram might be sent shortly to the Secretary of State suggesting a possible amendment of the schedule to embody whatever may be finally decided upon. This would entirely meet me.

IV.

(8th September, 1919)

The telegram is apparently intended to give the Secretary of State a draft of schedule III. If this is so I do not think that the portion marked 'A' in blue will do. Read with the wording of section 98 it does not seem to convey what is intended. The second alternative suggested in my note of 11th April 1919 was that a vacancy in the office of Secretary in the Legislative Department need only be filled from amongst the members of the Indian Civil Service (I am using the wording of section 98) if the Deputy Secretaryship was at the time held by someone who was not a member of the Indian Civil Service, and in the same way that a vacancy in the Deputy Secretaryship need only be filled from the Indian Civil Service if the then Secretary was an outsider. Now to embody this in Part II of the draft schedule is rather a problem, but in any case I do not think that the wording adopted in the telegram does it.

V.

(23rd October, 1919.)

I have tried to read this file with some approach to intelligence, but I find myself bewildered by allowances—much as the Hon'ble Mr. Sastri¹ was when he spoke on the subject not long ago in Council. I don't know why all these allowances are required, nor why nine-tenths of them should be increased. I don't object to the proposals made, I merely don't understand them.

Nor do I understand why there should be a difference between the pay of Deputy Secretaries in different Departments. Except where there are two Deputy Secretaries, I think they should be all equal. I cannot think that either the work or the responsibility of the Deputy Secretary in the Legislative Department is less than

¹ Mr. (now Right Honourable) V. Srinivasa Sastri

in any other Department. and owing to the very special qualifications required it is probably more difficult to fill than any other Deputy Secretaryship. If the only reason is that the Secretaryship in the Legislative Department is underpaid, the remedy is obvious.

VI.

(15th November, 1919.)

I do not propose to note at any length, though there is infinite matter for discussion in Mr Hailey's most valuable note. I agree with his proposals except on the following points —

- (1) I think that we must accept the Commission's proposals as to judicial appointments from the Bar. Speaking of the only province I know, I am quite sure that a considerable number of suitable candidates could be found.
- (2) If I am to choose between the two age limits for the London examination of 17—19 or 21—23, I have no hesitation in choosing the first, as embracing the school leaving age, and getting in younger men. Mr. Hailey deprecates the consideration of any fresh alternative, but I don't quite see why, as many new suggestions by local Governments have been considered on various points. Personally I should prefer a compromise of 18—21 with a two years' period of training.
- (3) As to bifurcation between judicial and executive I should have preferred to follow the Commission, but I have no very strong feeling on the subject.
- (4) As to pay, I am still in favour of expatriation allowance, as the obviously fair solution, and as meeting the charge of extravagance if equal pay all round is accepted. I should, however, be prepared to accept Sir Reginald Craddock's¹ suggestion for free passages and special remittances, which has much to recommend it. I do not think that Mr. Hailey's proposal meets the difficulties.

VII.

(19th December, 1919)

I have struggled long with the papers attached to this despatch and regret that in the end I find myself unable to sign it without

¹A former Home Member

appending a dissenting minute on paragraph 13. If the Home Department will kindly let me have the papers back I will prepare my minute. I am also unable to accept the omission of all reference to the question of an expatriation allowance (paragraph 41) without seeing the Secretary of State's telegram of November 18th which I have been unable to find among the papers.

VIII.

(28th December, 1919)

I regret that I am unable to accept the proposals made in paragraph 13 of this despatch. The Public Services Commission were of opinion that in view of the ability, attainments, and influence of the legal profession in India, the administration would benefit by judicial appointments from the Bar, and they therefore recommended that "to begin with 40 posts of District (Divisional) and Sessions Judges should be set aside for this purpose and that they should be filled up from the Bar as soon as the present vested interests in them have been met." To this recommendation there was no dissent from any member of the Commission except a cautionary note from Mr. Maude. Considerable interest has been manifested in it throughout India, expectations have been aroused, and much dissatisfaction has already been expressed at the delay in carrying it out. Now after more than four years the Government of India's proposals fall definitely short of the Commission's recommendation, and this, I believe, to be as impolitic as it is unjust to the legal profession. I have no doubt whatever that sufficient really competent men could be found to-morrow to fill these posts and that the result would be a great strengthening of the judiciary, but the lawyer class is anathema to Local Governments, and High Court Judges show little sympathy towards younger members of the Indian Bar. The argument that the reservation of these posts would prejudice the interests of the Indian Civil Service is one which I cannot accept, nor is it, in my opinion, of any real cogency. The constant increase of judgeships throughout the country would soon counterbalance the loss of these appointments, and if they had been definitely earmarked for the legal profession four years ago, as the Commission recommended, there would have been very little difficulty now. In my opinion, therefore, this recommendation of the Public Services Commission should be accepted in full and immediate effect should be given to it at whatever cost.

No. 138.

(I—II.)

EMERGENCY WAR LEGISLATION AND MARTIAL LAW
IN THE PUNJAB.*(Question of passing Validating and Indemnifying Bills.)*
(23rd April, 1919)

I.

I THINK that the time has come when this question should be taken up seriously and Home Department Proceedings A, July 1920, Nos 107—151 and K W every department should be (Legislative Department unofficial asked to review their action No 539) during the war and consider carefully in what classes of cases legislative validation may be required, and also cases for indemnity But it will be a hopeless task if the matter is allowed to drag on until suits are launched against us in the courts. If anything is to be done there the question *must* be dealt with urgently.

The doubts which have been raised as to our power under section 32 (2) of the Government of India Act by the decision of the Privy Council in the Moment case make it almost essential, in my opinion, that the necessary validation should be done by Parliament and this seems to have been recognized by the Secretary of State in the last sentence of his despatch No 74, Public of 8th June 1917, but if parliamentary legislation is to be put through, the need for an urgent consideration of our requirements becomes all the greater.

Indemnity legislation may be on a different footing as we are probably in a position to legislate for this in India. It might, however, be more convenient that this also should be provided for by the act of Parliament. This, however, can only be decided when we know in what classes of cases indemnification may be considered to be desirable.

The operation of martial law in the Punjab seems to necessitate an indemnity act, and probably provision should also be made by the same act for compensation where damage has resulted to private property from military action. Whether the Secretary of State would be willing to include this in any act of Parliament which may be passed, must be doubtful; probably he would not.

I am inclined to think that it might be desirable to address the Secretary of State as soon as possible upon the general policy of a validating act by Parliament. It is possible, though not likely, that a general act for the whole Empire may be under consideration. In any case one will probably be necessary for the United Kingdom, and it would be as well that we should know as soon as possible what action is contemplated.

II.

(9th January, 1920.)

I DO NOT think that I ought to delay this file to deal with any particular cases which are referred to.

The portion of the Bill which most concerns us is the Indian part of clause 7 (2), with which I will deal first. We may not unreasonably ask for modifications here, though I doubt if it will be much good our criticising the rest of the Bill. The chief necessity to us is to get validation in cases where we cannot validate ourselves, and in particular in cases to which the principle of the *Moment* case may apply. To cover this I think that the last part of clause 7 (2) requires amplification. I should like to see an addition at the end of the clause to provide that the Order in Council may also declare that nothing done under such Acts or any rule made thereunder shall be invalid by reason only of section 32 (2) of the Government of India Act, 1915. It will be acts done under the rules which will cause us the greatest difficulty, and they should be definitely referred to.

It is also important that the Order in Council should allow His Majesty to set up tribunals in India for the assessment of compensation and to declare the principles by which such tribunals are to be guided. I do not think that this could be done under the clause as drafted.

I see no harm in scheduling the Acts concerned if this is required, but I think that the list must be exhaustive.

The reference to the Attorney-General should also be modified so as to cover the various law officers in the different provinces of India.

I do not like provisos (b) and (d) of clause 1, it would certainly suit us better if they can be relegated to the compensation clause [clause 2 (1)]. I doubt if this will be accepted at home, but it will be very unfortunate if a number of cases under these provisos are made the subject of suits in a peculiarly litigious country like India. The salt cases are definitely in point. They are probably cases of pure profiteering, but it is at least conceivable that on a basis of market value the buyers from Government may be held legally entitled to heavy damages. The principle of the *Moment* case probably precludes our legislating with regard to them in India. It is just possible that Parliament may, in view of Indian conditions, give power to His Majesty by Order in Council to declare that cases arising under provisos (b) and (d) shall be dealt with under clause 2.

There is nothing in clause 1 which precludes suits being filed under these provisos by enemy subjects, and I think that attention should be called to this, having regard to the provisions of the Peace Treaty. Here again it is, in my opinion, at least doubtful if we can legislate to this effect, having regard to the *Moment* case.

It should, I think, be pointed out to the Secretary of State that we have a good many persons out here whom we have had to intern during the war owing to their enemy proclivities, though they were not technically subjects of enemy states, and I doubt if they should be entitled to compensation under clause 2. Attention might also, I think, be drawn to the words in clause 2 "direct or substantial loss" which would seem to allow of claims for indirect damage provided that it was substantial. I suggest that the word "or" should be "and". We should also, I think, ask for some definition of "enemy", and if possible one that would include companies and associations, and that cases where awards have actually been made under any Act should be excluded from the operation of clause 2.

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No. 139.

AMENDMENT OF THE INDIAN MERCHANT SHIPPING
ACT, 1883.

*(Question whether Indian Marine Ships are ships "belonging to
Her Majesty.")*

(23rd April, 1919.)

If the administrative departments press for this amendment,
- Department of Commerce and In- I do not think that we can ob-
dustry Proceedings Merchant and ject on the ground that any
Shipping A, October 1919, Nos 1—8. such amendment ought to be
(Legislative Department unofficial considered in connection with
No. 266 of 1919) the General revision of the Mer-
chant Shipping law as I see no immediate chance of this being
taken up. If it *were* possible, I should certainly prefer not to tinker
with this particular section of the Act of 1883

I am not sure, however, that the suggested amendment is quite
such a simple matter as it appears at first sight. I am inclined to
think that the words "in the service of Her Majesty or the Govern-
ment of India" were inserted in our Shipping Acts to cover the
Indian Marine, which was originally an East India Company service
and the ships of which have not been treated as forming part
of the Royal Navy, but as belonging to a separate service: see 47
and 48 Vict. Cap. 38, Section 6. A distinction seems also always
to have been drawn between "Her Majesty's service" and
"Indian Marine service". see Act VI of 1891, Section 1 amending
Section 12 of the Act of 1859.

Whether therefore if the words "in the service of Her Majesty
or of the Government of India" are omitted from section 5 of the
Act of 1883, (i.e., leaving only the expression "belonging to Her
Majesty") the section will cover Indian Marine ships seems to be
doubtful, and I should be glad to have this point elucidated. Per-
haps the Director of Royal Indian Marine can help us. The
specific question would be whether Indian Marine ships can pro-
perly be described as "belonging to Her Majesty". If there is
any doubt about this, any amendment that is to be made should
provide clearly for their exclusion from the Act.

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No. 140.

TRUSTEE AND TRUST PROPERTY

*Question whether property vested in a trustee vests in him personally or *virtute officii*)*

(3rd May, 1919).

It is, I think, clear that where property is vested in a trustee it vests in him personally, and not *virtute officii* so as to pass automatically to the succeeding incumbent of the office.

Home Department Proceedings
Public A., December 1920, Nos. 1—82
(Part I).
(Legislative Department unofficial
No 137 of 1919).

I remember advising to this effect in a previous case from the Home Department in which Sir Reginald Craddock¹ was very indignant that the law could be so stupid. I rather think that this was in connection with the Dufferin Fund but I am not sure. The other points to which Secretary refers have no doubt been provided for in the draft trust deed.

¹A former Home Member.

No. 141.

POWERS OF THE MAHARAJA OF TRAVANCORE IN RESPECT OF HIS LEGISLATIVE COUNCIL AND HIGH COURT.

* * * * *

(6th May, 1919.)

Foreign and Political Department
 Proceedings Secret, Internal, July 1919,
 Nos 124—128
 (Legislative Department unofficial
 No. 365 of 1919.)

I decline altogether to "vet" a bill in the Travancore Council. If they like to use ridiculous language, or to strike out on a new line of their own, it is not for us to correct them.

I quite agree with Colonel Holland that if the supreme legislative power still rests with the Maharaja it would be more suitable that he should himself declare the constitution of his council, than that the council should do it for him, and incidentally declare the status of the Maharaja. But I understand that the highest court of the state has already held that the supreme legislative power has passed away from him by his own act, and they would not be likely therefore to recognise the validity of any edict he may issue. Whether the Maharaja has reserved to himself the supreme power of revising the decisions of his High Court, I do not know, but if he has not, the issue of an edict would be a mere *brutum fulmen*. History teaches us that the outcome of a constitutional struggle of this sort between King and Parliament can only be surrender by the "King"—or a revolution, though either may be delayed by an appeal to arms. As the last is obviously undesirable, and the "King" can still procure an act from his "Parliament" recognizing his royal prerogative, this seems to be the best, though no doubt rather a humiliating, way out of the difficulty. It is probably a step on the road to surrender, but it will stop the mouth of his High Court, which no edict can do, and it will with luck carry him on for a generation.

No. 142.

QUESTION WHETHER ROYAL INDIAN MARINE OFFICERS
ARE ENTITLED TO EXEMPTION UNDER SECTION 6(I)
(i) OF THE INDIAN INCOME-TAX ACT, 1918.

(16th May, 1919.)

I feel considerable doubt whether Royal Indian Marine officers are strictly speaking "Members of His Majesty's Indian Forces". Their case was certainly not considered when we were drafting the Bill. But Marine Department Proceedings Organization A., September 1919, Nos 3632-3633. (Legislative Department unofficial No 321 of 1919). But having regard to the decision on the other Royal Indian Marine file that Indian Marine ships are to be regarded as "belonging to His Majesty", and that the Royal Indian Marine Service is recognized by section 6 of 47 and 48 Vict. Ch. 38 as a service of His Majesty's, I think that it would certainly be within the spirit of the Income-Tax Act provision to exempt them under section 6 (I) (i); and it is hardly possible that objection can be taken to this. It is I think, legitimate also to take into account in this connection the fact that officers of this service were receiving His Majesty's Commission.

The same result could be obtained by an exemption under section 44 of the Income-tax Act, and would I think clearly be justifiable. Finance Department however will no doubt prefer to treat the case as covered by section 6 (I) (i) which I think they may reasonably do.

No. 143.

QUESTION WHETHER THE ACTS MERELY DECLARED BY THE MARTIAL LAW AUTHORITIES TO BE OFFENCES COME UNDER THE DEFINITION OF "OFFENCE" UNDER THE CODE OF CRIMINAL PROCEDURE, 1898. INTERPRETATION OF SECTION 402 OF THE CODE.

(17th June, 1919)

I AGREE. Having regard to the definition of "offence" in the Criminal Procedure Code, I think that section 401 applies to every sentence passed in respect of anything which is an offence within this definition, but it would not cover acts merely declared by the Martial Law authorities to be offences. I think that the interpretation of section 402 must follow that of section 401.

Home Department Proceedings
Judicial A., June 1919, Nos 319-320.

(Legislative Department unofficial
No. 559 of 1919).

No. 144.

QUESTION WHETHER A LOCAL GOVERNMENT CAN
CONFER ADDITIONAL POWER ON A HIGH COURT.

(*Examination of section 79 (4) of the Government of India Act, 1915
in its bearing on section 106 of the Act*)

(23rd June, 1919)

I FEEL considerable difficulty on this question. Section 106 of the Government of India Act, 1915, declares that the High Courts have certain powers, and clearly a Local Government could not *take away* any of these powers from them, though the Government of India could do so in virtue of section 131(3) and the 5th Schedule of the Act. But does it necessarily follow that a local Government cannot confer *additional powers* upon a High Court? The test, I imagine, is under section 79(4) whether such an enactment would "affect" section 106, and I confess that I find it very difficult to say with any confidence that it would. We have usually taken "affect" to mean "prejudice" or "detract from." On the whole I should be inclined to let the provision stand for the present, warning the local Government that the point is a doubtful, one, and waiting for a decision of the High Court of the province as to its validity.

No. 145.

(I—II.)

AMENDMENT OF SECTION 116 OF THE INDIAN ARMY ACT WITH REFERENCE TO THE CASE OF SOLDIERS REPORTED MISSING ON ACTIVE SERVICE.

I.

(17th July, 1919.)

I DOUBT if any case has been made out for legislation. I should, however, like to know, if the information is obtainable, how insurance Companies have dealt with the claims under soldiers policies, and upon what proof of death they pay. This seems to me to be one of the most practical questions involved. It is possible that Mr Meikle could help us as to this.

Army Department Proceedings February 1921, Nos. 2576-2578 and Appendix.
(Legislative Department unofficial No 615 and 777 of 1919)

Deputy Secretary has called my attention to the Army Department's letter No. 10969-9 (A.D.). This seems to indicate that insurance Companies are prepared to act out here on the ordinary "death report" as they do, I believe at Home. If this is so I can think of no other purpose for which legislation would be required. If the Army Department issue "death report" for what they call administrative purposes, they can surely issue them in other cases.

II.

(13th August, 1919.)

I regret that I failed to note on this point when the papers were last before me.

I feel some difficulty about the proposal in paragraph 1 of Secretary's note of 15th July 1919 which I have now discussed with him. If it is necessary to bring it under section 114 men reported missing but whom the authorities are prepared to certify as dead, I think it would be better done by an amendment of section 116. There should however, in my opinion be a definite period prescribed during which the man should have been missing

and nothing heard of him—I should say myself at least a year—and probably the provision should be confined to active service. One has got to have regard to the possibility that the man may turn up again and to his interests if he does. If section 114 is to be applied to such cases it will be lawful to hand over the balance of his assets to his representative, which presumably means his legal representative. I doubt however if we should go further than this. If section 115 is to be applied to such cases, “the prescribed person” could hand over the surplus assets to any one, and if the missing man turned up again he would have no remedy. This seems to me to be going too far.

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No. 146.

QUESTION OF CREATING AN INDIAN BAR PROPOSED
RESTRICTIONS ON INDIAN STUDENTS SEEKING
ADMISSION INTO INNS OF COURT.

(26th July 1919.)

It would be waste of time for me to go over the ground again that has been so ably traversed in these memoranda. Everyone is agreed that there are evils in the present system they only differ as to the remedy.

Home Department Proceedings that has been so ably traversed
Judicial Deposit September 1919, in these memoranda. Everyone
No 12. is agreed that there are evils
(Legislative Department unofficial No in the present system they
797 of 1919 Confidential File No 560) only differ as to the remedy.

The real question is whether the proposal that Indian High Courts should have the power to admit barristers, *i.e.*, to entitle law students after examination to call themselves "barristers" instead of advocates as now, will check the flow of unsuitable and unwelcome Indians to the Inns of Court at home. Personally I don't think it will. I doubt if there is much magic nowadays in a man's writing "barrister-at-law" after his name. Dr. Arnold speaks of "the designation 'barrister' having passed into the vernaculars of India with much the same connotation as that of a title of honour". This may have been the case a generation ago when Indian barristers were few and far between, and may be so now in the Punjab for all I know, but in most parts of India familiarity has bred contempt. The Indian client requires to know a great deal more about a man than that he is a barrister before he trusts his business to him, and can in most cases appraise his professional value with considerable exactitude. Why so many young men are sent to England to qualify is because the door is wide open there to this particular branch of the legal profession, and the chances of failure are minimised. I speak of course with an intimate knowledge only of Bombay. There an "advocate" need not also be a barrister, but can be admitted to all the privileges of the profession throughout the Presidency by local examination, and the two are very much on even terms. Among the Indians in the largest practice in the High Court at the present time there are probably half a dozen who are only "advocates" in Calcutta, I understand, the Judges decline to admit anyone but a barrister. This, I think, to be a mistake, but the remedy is clearly in their own hands and the practice appears to be confined to Calcutta. Sir William Duke¹ thinks that it is only in the more benighted parts of the mufassal that the status of barrister tells, and this may be so in Bengal, but probably in such places

¹Member of the India Council.

there is no very marked difference in legal attainments between the barrister and the vakil, if the balance is greatly on the side of the vakil, clients will soon find it out. However, unfortunately in the smaller mufassal courts it is not always legal attainments that are first regarded.

I am not greatly impressed by some of Dr Arnold's other arguments, though these again may have been valid enough in the Punjab. Within my own experience in Bombay there has been very little jealousy between vakils and barristers certainly. I should say none between the leading vakils and barristers. There is no competition between them, and so far as I ever heard no soreness. Nor again have I heard much in the way of complaints about the necessity of sending boys to study in England. It is usually regarded as a fairly safe investment to be preferred to the risk of failure in India, and often as a matter of pride. I do not think that it has ever been made a political grievance that India has not been accorded the right to admit "barristers," or that in this respect she is in an inferior position, to that of the Dominions, and it is obvious, having regard to the question of race, that the cases are in no way parallel. Some years ago Sir Erle Richards¹, I think, took up the question of making Indian K. C.'s but the proposal was dropped, as it was ascertained that it would not be welcomed by the profession unless they were allowed to rank in every way with K. C.'s at home, which was regarded as impossible. I should myself be glad to see this innovation introduced on colonial lines, as it would form a useful distinction between seniors and juniors at the Indian bar. The difference however of status between colonial and home K. C.'s in some cases is very marked. I remember when I was in Canada some years ago cutting out from a local newspaper an advertisement in which Mr. K.C. advertised that he was prepared to act for clients on the most reasonable terms¹. I should be very sorry if we were to come down to this sort of thing in India.

For these reasons I do not think that to give the High Courts in India the power to make "barristers" is likely to be a sovereign remedy for existing evils, and if the sole test for admission to practice as an advocate is to be a local examination, the almost inevitable result will be to eliminate the European element altogether, which I should regard as lamentable. No racial discrimination could be made, and it is hardly conceivable that an Englishman who had been called at home would come out to the bar in India if he knew that he had to pass another examination there before he could be admitted. Many men in the past

¹ A former Law Member.

have come out after some years in practice at home, as Sir William Garth did, and we had a good many similar cases in Bombay, including one even of an Irish K. C., though it must be admitted that he was not a permanent success. There can be no doubt whatever that the heaven of the English barrister is most desirable, they help to keep up the best traditions of the profession, and in many ways exercise a most wholesome influence. They are getting fewer year by year and I should be very sorry to see any steps adopted which would mean their final disappearance. I am glad to see that in this I have the clear support of such eminent authorities as Sir Lawrence Jenkins and Lord Sinha, and I have no doubt whatever that Mr. Basu¹, who has had a long and intimate experience in Calcutta, will agree.

Quite apart from this, however, I feel no doubt that from the professional point of view it is a great advantage to an Indian of the right sort to have been trained in England. He imbibes at all events something of the spirit which has made the English bar famous throughout the world, sees something of the dignity of the law and the respect in which it is held; he moves in a wider circle and almost necessarily acquires broader views. I feel sure that each one of the Bombay "advocate" to whom I have referred above, successful as they have been in their profession, would have been better men still if they had been trained at one of the great Inns of Court in England. That they are many among the mass of Indian law students in London who gain nothing by their adventure, and who return to their own country at least as useless as when they left it, is of course indisputable; but what is wanted is not to make it unnecessary for any to go, but to encourage the sending of those who are fit, and to shut the door absolutely against the manifestly unfit.

If, therefore, the Inns of Court cannot be induced to raise the standard of their examinations and I feel convinced that it is useless to continue to urge this—the best policy in my opinion would be to ask them to refuse admission to any Indian student who does not produce a certificate of competency and character from a recognised authority in India. I would constitute Committees under the superintendence of each High Court, Chief Court, and Judicial Commissioner's Court, who alone should be entitled to give the necessary certificates. They should be based upon whatever standard was considered most suitable to the conditions of the province and to the class of man most wanted in the profession and there should be definite age-limits. I cannot think that the Inns of Court would refuse to fall in with some arrangements of this kind which would to a great extent eliminat

¹Mr. B. N. Basu, a Member of the Council of India.

the type of youth which has brought the present system into so much disrepute. If this were combined with a more liberal system of State scholarships for deserving law students who could not otherwise afford the expenses of training in England, it would, I believe, meet all the requirements of the case and be welcomed in the profession. Whether or not the Universities at present give law scholarships I do not know but if they do, it is only in very exceptional cases, and in my opinion a considerable expansion in this direction would not only be a great help to the restrictive policy which I advocate but would be an excellent investment of State funds.

I also think that the period of training in England should be rather prolonged than reduced as it so often is now by the remission of what are called 'grace terms'. In this again I believe the Inns of Court might meet us. A further point that might be considered by the High Courts is whether they should not under such a system require every certificated student to take honours at the English examinations in at least one subject.

There are various other reforms which are clearly desirable. I entirely agree with Lord Sinha that reading in the Chambers of an advocate in India should be substituted as far as possible for reading in Chambers in England, and I should like to see the system of "pupils" established in India on exactly the same footing as at home. I do not know what is the practice in this respect in the other High Courts, but in Bombay, though most of us used to take young Indians into our Chambers, it was always as a matter of favour and not of payment. The High Courts could exercise some control over the system if carried out in India, and the training would be of far greater value than anything which is obtainable under specialised practitioners in England. I also entirely agree with Mr. Basu that district Judgeships and other legal appointments should be to a large extent thrown open to the bar in India. I do not want to argue this point, as I believe the principle has already been accepted, though so far nothing has been done towards carrying it into effect. I would also open all appointments, which are now confined to barristers, to advocates. Whether in this respect vakils could be placed upon the same footing generally would require careful consideration. The vakil is in the practice of his profession much more nearly akin to the solicitor than to the barrister, in fact in the Presidency towns at all events nearly every solicitor is also a vakil. In England neither judgeships nor the highest legal offices are open to solicitors, and the reasons for this are fairly obvious. Personally I should hesitate before putting vakils generally on the same footing in this respect as barristers.

If the proposals now put forward by the Secretary of State are to be seriously taken up, I think that the only way of dealing with them would be to get together a Committee representative of both the bench and the bar (including vakils) in every Province and see if any definite conclusion could be reached. In the meantime a copy of these papers might perhaps be sent to the Chief Justices, Chief Judges and Judicial Commissioners of all our courts and also to the various Advocates-General. The matter, however, would be one for the Home Department to deal with and no doubt His Excellency would wish to consult the Home Member. I also venture to suggest that Mr. Shafi's opinion would be of great value, as he comes fresh from the bar of a Province of which I have little knowledge, and in which much of Dr. Arnold's experience must have been gained.

No. 147.

(I—II.)

LIABILITY OF THE AGENT, MASTER AND SHIPPING
MASTER UNDER THE MERCHANT SHIPPINGS ACT*
OF 1859 AND 1883.

I.

(28th July 1919)

I think that we must ask Commerce and Industry to consider this proposal further in the light of this Department's notes. I should be altogether averse to making such a considerable change in the scheme of our acts as is suggested. It is to my mind essential that the master who is in actual control of the seamen, should in every case (except such as those provided for by section 27 of the Act of 1859) sign the agreement with them, and that they should know that he is directly responsible to them for its due performance. It seems extraordinary to me that in sending in such an application the Bengal Government should make so light of the master's breach of his statutory duty in the case referred to, and the gross slackness of the Shipping Master in allowing it. When we come to consolidate, it will be very desirable that the penalty for breach of this duty should follow immediately after the provision requiring the master to sign, as it does in the English Act (section 113 of the Act of 1894). It may be that the penalty clause is liable to be overlooked owing to its appearing only in the Act of 1859 (section 28), while the provision for signature by the master has to be looked for in the Act of 1883 (section 27). It is, however, quite clear on the face of the printed form of agreement that it is the master who has to sign, and I cannot understand how the Shipping Master can allow an actual alteration of the print to allow of the agent's signature. Unless there is some thing to show that such mistakes are frequent and unavoidable, I do not think that we ought to legislate to provide for a clear neglect of duty by our port officials. If legislation is necessary, it ought rather to be in the direction of imposing a considerable penalty upon the Shipping Master or other responsible officials.

As to the other question of making the agents directly responsible for the payment of wages in the absence of the owner, there

*See now the Indian Merchant Shipping Act, 1923.

may be some argument in its favour, though I doubt if it is very cogent. The master's liability to pay under section 55 of the Act of 1859 is clearly not dependent upon his having signed the agreement, as there is no provision in that Act for his doing so, and it appears to be an independent statutory obligation laid upon him by the section, otherwise, if there had been a change of master, the seamen would lose their remedy, which cannot, I think, have been intended. I greatly regret that, in the case referred to, summary proceedings were not taken against the master under section 55 of the Act of 1859, and the question of his liability tried. I cannot conceive that it would be any defence for him either to plead a breach of his own statutory duty, or to urge that the owner was the proper person to pay, and not himself—at all events in a case where the owner was not amenable to the jurisdiction and his agents refused to pay. If, however, on further consideration it is thought that there should be a definite remedy against the agents under the Act in such cases, I should see no great objection to providing by section 53 of the Act of 1859 that the term "owner" should, where the owner is non-resident at the place of payment, but is represented by an agent, include such agent. I doubt, however, whether this is really necessary, if the master is, as I think, always liable, having regard to the provisions of section 56.

II.

(7th October 1919)

When I noted before I was fully aware of the practice of engaging lascars at a port different to that at which the ship was lying. If it is necessary for the agents to enter into a preliminary agreement with the men at the time of the engagement, there can be no legal objection to their doing so, but this does not preclude the necessity of the subsequent statutory agreement signed by the master, nor ought it, in my opinion, to be altered to take the place of the master's agreement.

No. 148.

(I—III.)

AMENDMENT OF CHAPTER IX OF THE CODE OF CRIMINAL
PROCEDURE, 1898

(*Proposed inclusion of the Indian Defence Force, Naval Forces and
the Royal Air Force.*)

I.

(5th August 1919)

If the Indian Defence Force is to be substituted for the
 (Legislative Department unofficial Volunteers as a permanent
 Nos 713 and 824 of 1919) internal security force, I quite
 Confidential file No 567. agree that Chapter IX of the
 Criminal Procedure Code should
 be amended so as to cover them, and it is probably desirable also
 to include naval forces. Neither of these additions would, I think,
 cause much trouble. But if the Air Force is also to be included
 I have no doubt that we shall have the whole of the non-officials
 against us, and I think that this question merits very serious consi-
 deration.

It can, I think, only be necessary to bring the Air Force into
 Chapter IX if they are to be used *in aid of the civil powers* for the
 purpose of bombing and personally I feel that this ought not to be
 done. The dropping of bombs on a crowd can seldom be necessary,
 and the indiscriminate damage which must ensue would always be
 far greater and less controllable than that caused by firing, where
 it is at least possible to aim at those in the forefront of the crowd
 and presumably therefore the most dangerous. The only case in
 which bombing from an aeroplane has so far been resorted to was
 where (I understand) martial law had been put in force, and the civil
 powers had been altogether supplanted by the military. Chapter IX
 of the Code has nothing to do with such a case, and the inclusion of
 the Air Force in its provisions would not cover a case of Martial Law,
 which would in almost every conceivable instance have to be follow-
 ed by a specific act of indemnity. I greatly hope therefore that we
 may not be pressed to include the Air Force in the amendment of
 Chapter IX. I should be glad if the Home Department would re-
 consider the question from this point of view.

I quite agree that the question of the amendment of the Crimi-
 nal Procedure Code must be taken up separately from that of an
 act of indemnity in respect of the recent "rebellion."

II.

(10th August 1919)

As I understand the wishes of my Honourable Colleague in the Home Department Chapter IX of the Criminal Procedure Code is to be amended this coming Session by providing for the Indian Defence Force and Naval Forces and the question of the Air Force left over for future consideration. This may necessitate two bites at this particular cherry, unless we can find some other way of bringing in the Air Force if it is decided to use them, but it is preferable to bringing up the Gujranwala incident in this particular connection.

I understand from General Bingley that they have an Indian Defence Force Act already drafted in the rough, and that it is intended to introduce it by publication after the September Session is over.

III.

(21st August 1919)

The questions involved grow more complicated as this file circulates, and I think it is necessary to disentangle them. The first question to be answered is one of pure policy, *viz.*, is the Royal Air Force to be used in the future in aid of the civil powers in the same way that soldiers are used? So far as it has been used in the recent disturbances, I understand that the members of the Force will be covered by the proposed Indemnity Bill. The second question to my mind, is whether, if it is to be so used, is the present moment a wise one to choose for legislation on the subject? If both these two questions are answered in the affirmative, the third question arises, *viz.*, how should this be effected?

As to the first question, though I of course recognize the great effect that the use of aeroplanes for purely police purposes, would have, this is not necessarily conclusive. We should not for instance—or I so assure—legalize the use of poison gas for this purpose. I am told that aeroplanes are just as effective when using machine guns as when using bombs, but we could hardly legislate to confine their use to the one without legalizing the use of the other. I do not think that their use for reconnaissance and intelligence purposes would necessitate any legislation, nor do I think that the question of civil aviation comes in at all events at present. On the general question it would be interesting to know how the question with regard to their use in aid of the civil power stands at home. It must also, I think, be remembered that we could not legislate to

MC42LD

give effect to this policy without obtaining the sanction of the Secretary of State, and we could hardly ask for this on a question of such importance by telegram and expect an immediate reply in the affirmative. Indeed it is difficult to anticipate what the views of the Secretary of State would be on such a matter.

As to the second question, I am inclined to doubt whether it would be wise to bring in legislation on such a question until at least the commission has reported. If we do not legislate now, we probably cannot use aeroplanes in aid of the civil powers in any future disturbances which may arise between this and February next, unless their use is legalized by an ordinance which would be a possible course to adopt, if an emergency arose again. However we have got on for a great many years without them and it may not be altogether impossible to do so for another 6 months. We should, I think, be in a better position to legislate after the Gujranwalla incident had been enquired into by the commission and their views known.

As to the third question, I should prefer to reserve my opinion until the first two have been finally answered. I am inclined to think that it might be possible to amend the General Clauses Act so as to enable the Royal Air Force part of the army in India for all purposes if the Army Department saw no objection to this. Personally till quite recently I thought, they were merely a part of the army. Naval forces might, as General Hudson suggests, be disregarded as they have, I believe, never yet been used in aid of the civil powers. The existing Indian Defence Force might fairly be brought into the Criminal Procedure Code direct as being merely the present equivalent of the old volunteer and the new Indian Defence Force by whatever name called, might be provided for by their own Act. I very much doubt whether any camouflaging of the introduction of the Royal Air Force will escape notice at such a moment as this, and I would not at all events rely too much upon it.

No. 149.

APPEAL TO THE PRIVY COUNCIL.

(High Court's Power to refuse leave to Appeal in cases where no Substantial question of Law is involved.)

(11th August 1919.)

With regard to Sir Arnold White's suggestion that the High

Home Department Judicial A, Proceedings August 1919, Nos. 193-194.
(Legislative Department unofficial No. 753 of 1919).

Courts should always be allowed to refuse leave to appeal to the Privy Council unless there was a substantial question of law involved, I am in entire agree-

ment with the view expressed by the Judges of the Calcutta High Court. It is notorious that the Judicial Committee constantly upset the High Courts on questions of fact, and such a change would be as unpopular in India as it would be, in my opinion, undesirable from the legal point of view.

No 150.

(I—III.)

PRIVY COUNCIL APPEAL OF CERTAIN PERSONS SENTENCED BY MARTIAL LAW COMMISSIONS.

I.

(12th August 1919.)

If it was not for the great authority of Sir John Simon Home Department Judicial A., I should have little hesitation in saying that the particular contention in question was

Proceedings October 1919, Nos 228—250.
(Legislative Department unofficial No. 779 of 1919) without substance, but it is difficult to understand, without a fuller report of the argument, how it could have weighed so much with the Board, unless there was more behind it than we can see at present.

In the first place it would have been difficult to use any wider words in Ordinance IV than we did, *viz.*, “any person charged with any offence.” There is no reference throughout the Ordinance to the Regulation of 1804, so *prima facie* there could be no reason to limit these words to persons or offences to which the Regulation applies.

But beyond this the preamble to Ordinance IV seems to make it clear that the Ordinance is to apply at all events to other persons and other offences than those specified in Ordinance I. Turning to Ordinance I, the preamble shows that it is to apply (1) to persons of the classes referred to in the Regulation and (2) to offences described in the Regulation. If therefore the preamble to Ordinance IV is to be treated as a key to its interpretation, it seems to follow logically that the object and intention of the Ordinance was to provide for the trial of persons and offences other than those to which the Regulation applied—a result which directly negatives Sir John Simon’s argument!

It may be difficult to say whether the condition of being caught in the act (which the Regulation appears to prescribe) is a condition applying to “persons” or “offences,”—I think myself that it qualifies “persons”—but this seems to be immaterial since the preamble to Ordinance IV refers, in my opinion, clearly enough to both *other* persons and *other* offences.

It is also, I think, quite clear upon the authorities that the preamble is to be treated as a key to the interpretation of the operative part of the Ordinance, and that this has been so from the earliest times. So Lord Coke says (Section 79-A.) “The rehearsa

or preamble of the statute is a good means to find out the meaning of the statute, and as it were a key to open the understanding thereof". In the *Sussex Peerage Case* in 1844 (11 Cl. and Fin. at 143) Tindal C. J. in delivering the opinion of the Judges says "If any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which according to Chief Justice Dyer is "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress" "In *Turquand v. Board of Trade* in 1886 (11 App. Cas. at 288) Lord Selborne says "There can be no doubt that if in the preamble, or in any other part of the Act, some purpose or intention is expressed, that should be borne in mind in construing everything which is ambiguous or open to more constructions than one."

The argument based upon the express words of the preamble is further supported, if it needs support, by (1) the conditioning of the offences by a time limit, and (2) the provision that any sentences may be passed which are authorised by law. As to (1), if the cases to be tried under Ordinance IV were only to be those of persons caught in the act, the time limit (*i.e.*, the limitation to offences committed after 30th March 1919) would be clearly unnecessary. As to (2), if the offences to be tried were only to be those covered by the Regulation, provision for lesser sentences than those prescribed by the Regulation, had already been made by Ordinance III, and it is inconceivable that the other new Ordinance, made only three days later, should not have referred to it if the intention was to alter its provisions. Moreover in the case of offences triable under the Regulation the sentences authorised by Ordinance III comprised every sentence authorised by law, so that the addition by Ordinance IV would be meaningless if it was intended only to refer to Regulation offences.

The mere fact that the Commissions proposed to be used for the purposes of Ordinance IV were commissions which had been set up for the trial only of offences under the Regulation, is surely no argument. All the new Ordinance does is to utilize existing machinery for a new purpose.

Having regard to these considerations I cannot say that I feel any grave anxiety on this particular point, but there may be something behind of which the Secretary of State's short telegram gives us no indication, and we must wait for the short-hand notes of the argument. I have only noted at this length because His Excellency expressed some anxiety to me on the point and asked me to look into it carefully. I will only add that I should be delighted to have the opportunity of arguing the point before the Imperial Council !

II.

(28th August 1919)

THE Leader's report of the arguments in the Privy Council is extremely interesting. But it does not make me change the views which I have expressed in a previous note. The attitude of the Judges, however, makes the case a much more serious one than I at first anticipated, and if two *ex-Chancellors* back the view that Ordinance IV could only have been intended to apply to persons and offences covered by the Regulation it is no use our pooh-poohing the contention. It rather looks as if Sir Erle Richards was not prepared for the argument, and I wish he had intervened and pointed out the words of the preamble when Lord Buckmaster first took the point.

Their Lordships tried to get rid of the preamble by suggesting that the reference to other persons and other offences is satisfied by the Ordinance being made to relate back to the 30th of March. I fail to see how this makes it applicable to other persons than those specified in the Ordinance. The persons there referred to seem to me clearly to be the same as those to whom the Regulation applies, and though the extension of the date may bring in other offences, it can hardly on any reasonable interpretation of the words enlarge the class of *persons* referred to. If it is once admitted that the scope of the Ordinance *qua* persons is extended indefinitely, I fail to see any reason for assuming that *qua* offences it is limited to those specified in the Regulation. The expression in the operative part of the Ordinance "any person charged with any offence" could, I think, hardly be read as "any person, whether a person referred to in Regulation X of 1804, or not, charged with any offence referred to in the said Regulation". To read the word "any" in two such opposite senses in one sentence appears to me to be totally opposed to the ordinary rules of construction.

In dealing with the last sentence of section 2 of Ordinance IV ("A Commission may passany sentence authorised by law"). Their Lordships seem to have been driven to one of the most "vicious circles" I have ever met with. They begin by saying that Ordinance IV can only have been intended to apply to offences covered by the Regulation; therefore the only sentence authorised by law is death, and their final conclusion is that the words quoted above from section 2 do not therefore indicate any extension of jurisdiction beyond that conferred by the Regulation. Having satisfied themselves by this extraordinary *petitio principii* that "any sentence authorised by law" was a mere camouflage for "the immediate punishment of death" prescribed

by the Regulation Lord Buckmaster proceeds to argue that unless his interpretation is correct "if you caught a boy doing something silly in the street you would have no alternative but to sentence him to death!" Lord Haldane uses much the same argument later on in assuming that the Ordinance, on the contrary interpretation, would necessitate the trial by commission of everybody who had stolen a pair of boots or got drunk in the street. This of course overlooks the fact that an order of the Local Government is necessary before any trial can be held by a commission under Ordinance IV.

If the object of Ordinance IV was merely to carry the provisions of Ordinance I back to the 30th of March, the obvious way of doing it would have been to amend the latter by substituting the 30th of March for the 13th of April. We may be very unskilled draftsmen in this department, but I cannot think that their Lordships would wish to assume that such a simple method of effecting what they consider to have been our intention could have escaped our notice.

There could also, I think, hardly have been any necessity if this was the only intention, to give a discretion to the Local Governments as to whether trials under the Regulation during the short period only should be held by commissions or not. It will be noticed that under Ordinance I *every* trial under the Regulation, unless already begun by a courtmartial, was to be held before Commissioners, and it is hardly to be imagined that His Excellency the Viceroy would go back from such a decision in respect only of offences committed between the 30th of March and the 13th of April or if this was his intention that no reference would have been made to it in the preamble.

It will, I think, be material to ascertain whether in any of the cases before the Privy Council the argument was addressed to the Commissions that Ordinance IV only applied to persons and offences comprised in the Regulation, and that therefore the trial before them was *coram non iudice*, as is now suggested. A recently published opinion of Mr. Hasan Imam, which I saw yesterday, seems to suggest that the point had never occurred at all events to him. If it was taken, it would have been material, as well as legitimate, to show the circumstances under which Ordinance IV was passed, and the cause and necessity of its being made. It would then, I imagine, have been perfectly easy to prove that there was no necessity to provide for the trial of persons charged with offences under the Regulation and taken in the act between the 30th March and the 13th April, but that there was an enormous number of other persons charged with other offences whom it was impossible to try by the ordinary courts. Evidence of this character would I think,

have been admissible on the grounds referred to above; see per Lord Blackburn in the *Raverwear* case, 2 A. C at 763, and Lord Halsbury in *Eastman v the Controllor-General*, (1898) A C at 576. If there had been any appreciable number of persons taken *flagrants delicto* in an overt act of rebellion between the 30th of March and the 13th of April, whom it was desired to try by Commission, this would naturally have been provided for in the first instance by Ordinance I. As a matter of fact there were probably very few such persons and they could of course even after the passing of the latter Ordinance have been tried by court martial under the original provisions of the Regulation

I have noted at some length upon this file as I may not have the time to do so later.

III.

(2nd October 1919.)

Home Department are at liberty to make any use they like of my notes and are welcome to send them home if thought desirable.

I should certainly suggest the omission of the passage on page 7 of Mr. Ellis¹ note on Martial Law, dated the 31st July 1919 beginning with the words "The first point in the argument is" and ending with the words "convicted on a charge under the Regulation." The view which Mr Ellis suggests as to the meaning of "taken" in the Regulation was I believe put to him by the Chief Justice of the Punjab High Court, but I believe it to be quite unsustainable. Certainly we have always assumed here that the Regulation only applied to persons "taken in the Act" and all our action has been based upon this view. I discussed this point at length with Mr. Ellis, and he appeared to agree. I also impressed upon him that to suggest this interpretation to the Judicial Committee would go far to nullify the argument suggested in paragraph 6 of my note of 28th August 1919 which I believe to be a strong one.

I doubt if there is much in the argument of paragraph 9 of Mr. Ellis' "Addendum." It is at least doubtful whether it is legitimate to refer to "Objects and Reasons" in order to see what an Act means, and in any case there are no "Objects and Reasons" attached to Ordinances. The Government documents to which Mr. Ellis refers at the end of this paragraph (or at all events all that he could refer me to) are all *ex post facto*. They undoubtedly show what we thought the Ordinance meant, but that is hardly evidence of our intentions. I do not think that we should be entitled to do

¹Legal Remembrancer, Punjab.

more than show the circumstances under which the Ordinance was passed and the cause and necessity of and for it.

Mr Ellis told me that the point raised by Lord Buckmaster was not taken before any of the Commissions. Being raised for the first time therefore in appeal, I think that we ought to be entitled to give evidence on these points, and in order to avoid a reference back to India to take such evidence, I advised Mr. Ellis to get a statement under the signature of the Lieutenant-Governor (if possible) showing how very few cases (Mr. Ellis said he believed there were in fact none) there were to be tried of men caught in the act between March 30th and April 13th, and what a great number of cases there were for trial of "other persons" charged with "other offences." Such a statement would not of course be "evidence," but it is quite possible that counsel for the appellant would accept it as correct

Yes Mr Ellis took home with him the statement with His Honour's signature.

H D CRAIK¹

to save a reference back. I do not know whether Mr. Ellis followed up my suggestion. If not I think that it would be worth while still to do so.

Paragraph 10 of Mr Ellis' "Addendum" contains a legitimate argument of some weight, but it is rather spoilt in the presentation. I doubt if the definition of offence in the Criminal Procedure Code can be resorted to for the interpretation of Ordinance IV, but the definition in the General Clauses Act is clearly applicable (see section 30 of the Act), and this is all that is necessary. The answer that will be made (for what it is worth) will of course be that the context shows that "offence" in the Ordinance means only an offence under the Regulation. But this is to my mind an application of the same *petitio principii* that seems to run all through the argument for the appellants.

I discussed all the main points of the argument with Mr. Ellis at some length, and asked him to let me know what view the Attorney-General took upon them in consultation. I also suggested that he should telegraph to me if counsel wanted further information upon any point which he thought we could supply.

I believe that all possible arguments have now been formulated. At all events I have nothing more to suggest.

¹Deputy Secretary in the Home Department.
N:C42LD

No. 151.

INTERPRETATION OF SECTIONS 5 OF ACT III OF 1858
AND 3 OF BENGAL REGULATION III OF 1818*(Issue of a fresh warrant at each transfer of a State prisoner under Regulation III)**(13th August 1919.)*

I HAVE some recollection of discussing this question informally with Sir James DuBoulay. The difficulty of an order of removal under section 5 of the Act of 1858 is that apparently the prisoner after removal will still remain in the formal custody of the person to whom the warrant was directed, and under section 3 of the Regulation of 1818 reports on the health, etc., of the prisoner will have to be made by him. I do not think we can read into section 5 of the Act of 1858 a transfer of these obligations to the new custodian. In cases of even temporary transfers, such as are referred to at the end of Sir William Marris'¹ note, presumably no such difficulties would occur, but it does not seem clear how they can be avoided, except by the issue of a new warrant, where a permanent transfer is necessary. I do not think that Sir A. R. Scoble's² note is conclusive as it does not touch on this point, and I am always rather afraid of analogies.

I have discussed this aspect of the case with Secretary and we think that it should be considered by the Home Department, the fact that reports were not made by the particular officer upon whom the duty is laid by the Regulation would not invalidate the detention in any way, but the Regulation is regarded of such importance, that it is desirable to observe its conditions with as much strictness as possible, and to leave no loopholes for attack in the Legislative Council.

¹Home Secretary.

²A former Law Member.

No. 152.

QUESTION WHETHER A PARTICULAR PERSON IS A
 " RULING CHIEF " FOR PURPOSES OF THE CODE OF
 CIVIL PROCEDURE, 1908.

(13th August, 1919.)

As THE law stands at present the question whether a particular person is a " Ruling Chief " or not is purely one of fact to be decided by the Courts. Expert evidence of political officers would no doubt be admitted, but their opinion would not be in any way conclusive. It would be for the Court to decide whether the person concerned was in the first place a " Chief " and in the second place a " Ruling " Chief. If the present petitioner exercises no jurisdiction of any kind I doubt if it could be said that he " ruled ". But it is not easy to predict what attribute of ruling a Court might consider necessary to bring a particular case within the line. It seems clear that plenary jurisdiction is not necessary, but I think that entire absence of all jurisdictionary powers should be conclusive at the other end of the scale. The solution of the difficulty seems to be what

On page 3 of notes in Frontier A., I suggested in my note on the July 1916, Nos. 1-2. Khan of Phulera's case, viz, an amendment of section 86 of the Civil Procedure Code making the certificate of a Secretary to Government conclusive on the point. It is possible that section 85 would also require consideration. I should have thought that this was a question which might safely have been submitted to the Chiefs' Conference

No. 153.

PRECEDENCE OF LORD WILLINGDON AS GOVERNOR ON,
HIS TRANSFER FROM BOMBAY TO MADRAS[*Interpretation of Section 90 (1) of the Government of India Act,
1915*]

(19th August, 1919)

I AGREE that the case of a Governor so appointed for a second term in another province was probably not contemplated when section 90 of the Government of India Act was compiled, and that there is some doubt as to how the section should be read in such a case. I think, however, that there is no need to go outside the plain words of the section, and that of the present Governors of provinces in India Lord Willingdon is the one "who was first appointed to the Office of the Governor by His Majesty." I think, however, that His Excellency might well ask for the opinion of the Law Officers at home on the point.

With regard to the Warrant of Precedence, Governors come under No. 2 in the list, *inter se* they rank according to their "date of entry into that number", and I think that it would be a reasonable interpretation of the Warrant to hold that Lord Willingdon entered into that number when he became Governor of Bombay.

I quite agree that it would be desirable that such cases should be specifically provided for.

No. 154.

EXAMINATION OF SECTION 15 OF THE CRIMINAL TRIBES
ACT, 1911.

*(Suggested separate re-notification of the Moradabad and Meerut
Sections of the Criminal tribes.)*

(30th August, 1919)

UNDER the act "tribe" includes part of a tribe, but "criminal tribe" does not include part of a criminal tribe. The Home Department Police A, Proceedings, February 1920, Nos 79—86 (Legislative Department unofficial No 747 of 1919) effect is that any part of a particular tribe can be notified under section 3 as a criminal tribe, but once it is so notified it has to be dealt with under section 12* as a whole. Section 15 however seems to contemplate a power under section 12* to deal with part of a criminal tribe, and is, I think, to this extent inconsistent with section 12*. The point ought really to be cleared up by amendment, but I understand that it is not desirable to bring the act up in Council again, and that we must make the best of it. Under the circumstances I do not think that we need insist strictly upon a "criminal tribe" being dealt with as a single unit, and may pass the proposal to restrict the Meerut and Moradabad portions of the criminal tribe (notified under notification No. 132-VIII-158 of 21st January 1914) to the Meerut and Moradabad districts respectively. No objection to the possible illegality of such a proceeding is likely to be taken. It would however be more strictly correct for the local Government to cancel the above notification and re-notify the two parts of the Dalera Kahar tribe concerned separately.

I do not think that the form of notification proposed will do, as the reference to domicile is, I think, insufficient. The mere fact that certain members of a tribe are for the time being in a particular district does not make it their domicile in any legal sense, nor should such a question of fact be left open to contention. The notification must separate them up, and specify the district in each case, and if this is done it may be more convenient to re-notify separately the Moradabad and Meerut sections of the tribe as suggested above. Apparently no action is to be taken with regard to the members of the tribe in the Badaun district or in Rampur.

*Omitted by Section 2 and Schedule I of Act 38 of 1920.

No. 155.

QUESTION WHETHER THE OFFICE OF A MEMBER OF THE GOVERNOR-GENERAL'S EXECUTIVE COUNCIL HELD BY SIR JAMES MESTON BECAME VACANT ON THE LATTER'S DEPARTURE FOR ENGLAND.

(2nd September, 1919.)

THE STATE of the law is very unsatisfactory. .

Sir James Meston's¹ case was clearly intended to be provided by the 1916 amendments² and I should be prepared to advise that reading the provisions of the* Act as a whole it was covered despite the fact that no amendment was made in section 87 (I)* though if that section stood alone I think it would be very doubtful whether upon his departure for Europe his office as a member of the Executive Council did not *ipso facto* become vacant. There would of course be no objection to a re-appointment in either case, subject to the requirements of section 36 (3) * I am not sure whether Sir James Meston is still a member of the Indian Civil Service, or whether he has been allowed to resign, and if so whether he would be eligible for appointment under the sub-section. I agree with Secretary that the point is one which should be submitted by the Secretary of State to the Law Officers. And that if their opinion is adverse opportunity should be taken to amend the Act *

Home Department Establishments A., Proceedings, January 1920, Nos. 114—119.

(Legislative Department unofficial No 1225 of 1919)

*The six months rule clearly has nothing to do with this case.

H M. S.

Page 86 of Judicial A, November 1916, Nos 373—425.

Page 37 of Judicial A., March 1916, Nos. 309—315.

¹Finance Member of the Governor-General's Executive Council.

²The references are to the Government of India Act, 1915.

No. 156.

QUESTION OF PAYMENT OF SIX MONTHS' SALARY TO
THE LEGAL REPRESENTATIVES OF THE LATE
BISHOP LEFROY, METROPOLITAN IN INDIA.*(Interpretation of Section 119 of the Government of India Act, 1915.)
(5th September, 1919)*Department of Education Ecclesi-
astical A, Proceedings, December 1919,
Nos 45—51.(Legislative Department unofficial
No. 631 of 1919).I THINK that on the Advocate-
General's opinion the claims of
the legal representative of the
late Metropolitan to 6 months'
salary should now be admitted.

Section 119 of the Government of India Act was evidently
drafted to meet the case of episcopal appointments made for leave
only,—as was the practice in the first half of the last century. It
is obviously inappropriate to the present time when Bishops already
in India are usually translated. I think that the point should be
noted for consideration in case the Act is to be amended in connec-

Eccl. A, May 1919, Nos 31—34

tion with the case of the Bishops
generally, as was suggested in
a recent despatch to the Secretary of State.

No. 157.

(I—III.)

QUESTION OF LEGALITY OR OTHERWISE OF ACQUISITION BY LOCAL GOVERNMENT OF IMMOVEABLE PROPERTY UNDER THE LAND ACQUISITION ACT, 1894, FOR A PRIVATE INSTITUTION.

(Case of *Isabella College*)

I.

(29th September, 1919.)

THE ACQUISITION of immoveable property under Act I of 1894 for the purpose of handing it over to a private institution is in my opinion clearly contrary to the spirit, if not the letter, of the Act. If this were not so there would be no reason to have special provision for the case of Companies. The land when acquired vests under section 16 in the Government, and could only be made over to a private institution by the Local Government under section 30 of the Government of India Act, 1915, and subject to the rules for the time being in force. How the Local Government propose to deal with this particular land after acquisition is not explained, but inasmuch as they only speak of contributing to the cost, it looks rather as if they thought the land would be the property of the Isabella College without more ado.

I see that there are great objections to turning down the whole thing, now that it has apparently been done, but I do not see how the Government of India can with their eyes open affirm an illegal act of the Local Government, and merely inform the memorialists that they see no reason to interfere. It will of course be open to the memorialists to file a suit for a declaration that the acquisition is illegal, and it will then be for the courts to decide whether it was so or not. The declaration of the Local Government that the land was required for a public purpose would not be treated as conclusive. See *Hamabai v. Secretary of State*, 421-A., page 44, and if the courts decided in the memorialists' favour the position would be a very awkward one. The case appears to me to raise rather a large question of principle, viz., whether we ought to refuse to interfere with the action of a Local Government where it is manifestly illegal on the ground that our interference may have awkward results.

*L. R. A., March 1917, Nos. 9—12.

L. R. B., May 1917, Nos. 17-18.

L. R. B., August 1917, Nos. 33—37.

L. R. A., March 1918 Nos. 25—27.

The case is in this aspect somewhat analogous to one which came* up recently from the same province with reference

to action taken with regard to a particular estate under the Court of Wards Act I would therefore suggest to my Hon'ble Colleague in the Revenue and Agriculture Department that the case might be well circulated and taken in Council.

I would add that the Isabella College could apparently register under the provisions of Act 21 of 1860, and that in virtue of the recent amendment of the Land Acquisition Act, the land could be acquired for it as if it were a Company, which is obviously the proper course though it would involve a public enquiry under Part VII of the Act.

II.

(14th October 1919).

I think we ought to tell the Local Government that in our opinion their action is at least contrary to the spirit of the Act and that if legal proceedings were taken by the memorialists to contest the validity of their action, it is possible that an adverse decision might be obtained which would raise a very awkward situation. They might also be asked if under the circumstance they cannot come to an agreement with the memorialists which would avoid further difficulties. It might also be suggested that possibly the acquisition might be cancelled and the Isabella College advised to make use of the recent amendment of the Land Acquisition Act after registering under Act 21 of 1860. I think that they should be told plainly that the Government of India will find it very difficult to support their action if no way out of the present impasse can be suggested by them.

III.

(20th October 1919).

I am afraid that my first note was very loosely written and the reference to the Privy Council case only confused the issue. It was not, as my Hon'ble Colleague points out, a case under the Land Acquisition Act, though a similar question as to "public purpose" arose under it. But under section 6(3) of the Act, to which my Hon'ble Colleague refers, it is only the Local Government that can acquire the land, and as I pointed out in my note, it must on acquisition vest in the Local Government (section 16). The ground upon which this transaction can be attacked in the courts is that it is not an acquisition by the Local Government at all, as they are acting merely as a conduit pipe to the Isabella College.

This seemed to me clear from the Local Government's letter, read with paragraph 4 of the memorial and Mr. Gilliat's note dated the 2nd August, 1919, especially having regard to the fact that the Local Government are not even paying for the land themselves, but merely giving the Isabella College a grant to help them in financing the acquisition. This appears to me to be merely a colourable acquisition by the Local Government, and if I were a judge before whom such a case came I should have no hesitation in holding it to be a fraud on the powers granted by the Act. I should certainly not be inclined to hold that my hands were tied by the provision of section 6(3) that the declaration of the public purpose is conclusive.

If, as my Hon'ble Colleague says this sort of thing has been done by Local Governments on various other occasions, it only seems to me the more important to put a stop to what I regard as a mere abuse of the Act. Let it be amended by all means if it is necessary, but I cannot think that we ought to condone a palpable evasion of its provisions.

Under these circumstances I regret that I must stand by my opinion. I cannot think that my Hon'ble Colleague would have differed from me a year ago

No. 158.

'ACQUISITION OF AN EASEMENT BY GOVERNMENT
UNDER THE LAND ACQUISITION ACT, 1894.*(30th September 1919).*

I DON'T think I have seen this case before, and the point with (Legislative Department Proceed- reference to the Land Acquisition Act is an interesting one.
ings B, December 1919, Nos) 32—36)

Under section 16 the land vests in Government free of "encumbrances," and this though an inappropriate expression from the legal point of view, has, I believe, been generally accepted as meaning that easements enjoyed over it by third parties are extinguished. Any such third party could come in as a person interested and claim compensation for the extinguishment, but would have no other remedy.

It has, however, been much debated whether Government can under the Act acquire an easement by itself. My own view has always been that an easement is a "benefit arising out of land" and, therefore, is capable of acquisition under the Act, but the drafting is so obscure that until the Act is amended the point must always be a doubtful one. The Bombay case referred to in the local Government's letter (Government of Bombay *vs.* Esuf Ali Salebhai, Indian Law Reports, 34 Bombay, 618) is at all events an authority for the proposition that where Government is already the owner of an interest in a particular piece of land, they can acquire other interests in it under the Act. This is, apparently, all that the Local Government wishes to provide for, and I see no objection to it as long as this limitation is incorporated. The wording of section 67 of the Bill as it now stands would enable the Municipal Commissioner to acquire any subsidiary interest in land which was not vested in the Corporation, *e.g.*, a right of way over private property.

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No. 159

RULES REGARDING DESTRUCTION OF RECORDS.

(30th September 1919).

THE question in each case is whether there is any provision of the law that particular documents are to be "kept and maintained." These words I think mean kept or maintained either in perpetuity or for some specific period. If there is such a provision rules for their destruction—at all events within the prescribed period—cannot be made under section 3 of Act V of 1917. The difficulty is to decide whether there is a statutory obligation to keep and maintain particular documents as this has to be gathered not only from the words of the Acts in question but from the objects in view. The Books and Indexes provided for by sections 51 and 54 of the Registration Act appear to me to be intended to be kept permanently and therefore rules for their destruction cannot be made. There is nothing to my mind to indicate that copies of entries referred to in section 56 are to be kept permanently. With regard to the documents which have to be filed under the Indian Companies Act and detailed in paragraph 3 of the Inspector-General's letter of 3rd February 1919 I agree with the Advocate General's opinion.

Home Department Judicial A,
Proceedings, December 1919, Nos. 5-6.

(Legislative Department unofficial
No. 901 of 1919).

No. 160.

BENGAL TOWN-PLANNING BILL, 1919.

(7th October 1919).

I NEED only note on the proposed procedure for electing an arbitrator and the provisions (Legislative Department Proceedings A., October 1919, Nos. 164-165.) of clause 39 (3) of the Bill.

On the former point I agree with Secretary. The proposed method of appointing an arbitrator appears to me to be most objectionable and I know of no precedent for it. Under the Bombay Act the arbitrator is, I think, appointed by Government. The new English Act for assessment of compensation on acquisition of land (9 and 10 Geo. 5 ch. 57) provides for a panel of arbitrators to be appointed by a committee, consisting (in England) of the Lord Chief Justice, the Master of the Rolls, and the President of the Surveyor's Institution, and the same committee makes rules for the selection of an arbitrator for the panel in each individual case. I am not of course suggesting this as a suitable system for Bengal but only as showing how far away the latest English example is from "Election."

In the case of appeals to the "Court" under clause 30 (3) of the Bill, it is not competent to a local Legislature to interfere with the revisional powers of the High Court under section 115 of the Civil Procedure Code as these powers were in existence when the Government of India Act 1915, was passed and are confirmed by it. The clause as worded would seem to be intended to exclude the power of revision and it would probably be better to modify it so as merely to provide that there should be no appeal which is I think clearly within the competence of the local Legislature. The right of superintendence follows the right of appeal.

No. 161.

RAILWAY WORKSHOPS.

(Application of Section 83 of the Indian Railways Act, 1890 and of the Provisions of the Indian Factories Act, 1911).

(10th October 1919).

I AGREE that the provisions of Section 83 of the Indian Railways Act apply to all railway workshops. I also agree that all railway workshops, where mechanical or electrical power is used, are factories within the provisions of the Indian Factories Act, 1911.

Railway Department (Railway Board) S. and T. A., Proceedings, November 1919, Nos. 1-2.
(Legislative Department unofficial No 969 of 1919).

I also agree with Secretary¹ that overlapping in the case of accidents can be avoided in the way suggested in the last paragraph of his note, if it is thought desirable; but this is clearly a question for the administrative departments concerned.

¹Mr. (now Sir) Henry Moncreff-Smith.

No. 162.

TRANSFER OF NEGOTIABLE INSTRUMENTS.

(14th October 1919).

SECTION 137 of the Transfer of Property Act excluded negotiable instruments from the operation of chapter VIII of that Act. This, however, only means that the special rules thereby laid down for the transfer of actionable claims do not apply, and it leaves negotiable instruments where they would have been if this chapter had not been enacted. They are still, therefore, "choses in action" which will pass by assignment subject to existing equities, despite the fact that they are "negotiable" and therefore may also be dealt with in another way. The paragraph of the Manual is, I think, clearly incorrect, but it may not be necessary to correct it at present. I do not think that the assignability of a Government Promissory Note as a chose in action embarrasses Government in any way, as cases of assignment must be extremely rare and a change in the law might rouse suspicions in the public mind.

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No. 163.

(I—II.)

LEGISLATION BY THE MYSORE LEGISLATIVE COUNCIL.

(Submission of a new law to the Resident before the Maharaja assents to it).

I.

(16th October 1919).

I do not know what powers the Maharaja has reserved to him under the Mysore Constitution but under Article 19 of the Treaty of 1913 he has undertaken that none of the scheduled laws shall be repealed or modified without the previous consent of the Governor General in Council. If the present practice of previous consultation with the Resident is given up, and a law is passed by the Mysore Legislative Council and assented to by the Maharaja, but is afterwards found to be in breach of Article 18 of the Treaty, can he by any means either veto its operation or repeal it? or has he sufficient voting power in the Council under his control to get it repealed? If so, the present practice may safely be relaxed; if not, I think that the Resident ought always to see the new law before the Maharaja assents to it.

I am all in favour of trusting a big Chief and relieving him of constant and meticulous supervision, but it is always possible that he might be advised that a particular legislative measure was not within Article 18, though the Government of India might subsequently hold that it was, and if there was no *locus peccitentiae*, it might be that our interests would be seriously prejudiced. The case frequently occurs as between the Government of India and Local Governments under section 79 (3) (e) of the Government of India Act, 1915. The Local Government thinks that a particular Bill does not affect religion or religious rites and usages and therefore does not require sanction, but when it comes up here, we hold otherwise. Several cases of this kind have occurred in my time here, and, with the best intentions in the world, similar mistakes may be committed by the Darbar.

II.

(19th November 1919).

THIS does not appear to me to affect the question materially, as the point is that the Mysore Government and the Government of India might take different views of the effect of legislation passed by the Legislative Council, and we might be faced with a *fait accompli* which it would be very difficult to undo. The present practice, which it is desired to change, is to consult the Resident demi-officially before the introduction of any Bill in the Council. This, I think, might be relaxed provided that the measure was submitted to the Resident before the assent of His Highness the Maharaja was given under section 13 of the Regulation of 1907, which was the course I suggested in my former note.

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No. 164.

NATURALISATION AND DENATURALISATION OF
ALIENS.

(24th November 1919).

I DOUBT if it is much use arguing this case any further with the Home authorities, but it may be worth recording my own views shortly in the event of the matter being taken up again in the future.

Home Department Proceedings
Public A., November 1919, No. 265.
(Legislative Department unofficial
No. 1121 of 1919).

The Home Office note divides the question of denaturalising persons whose British nationality depends upon the accident of birth in the British dominions into two classes, *viz.*, (i) those who have a dual nationality according to the law of a foreign State, and (ii) those who have not.

As to (i), the main objection put forward is that there is no precedent for our proposal in the nationality law of any civilised State. But this, I think, is largely due to the fact that most civilised States have adopted the doctrine of the *jus sanguinis* instead of that of the *jus soli*, and that it has only been owing to the unprecedented conditions obtaining in the Great War that the necessity of reconsidering the past practice has arisen. I doubt, moreover, if the French, who have to some extent adopted the *jus soli* doctrine, would feel any difficulty in dealing with a similar question arising between themselves and Germany. The United States, who have of course followed us in their nationality law, obviously stand on a different footing altogether, as Americans are essentially a conglomeration of people from all European countries, and much the same considerations apply to the South American Republics.

As to (ii), I admit that the argument is not so strong in the case of British born subjects who have no right of election under section 14(1) of the British Nationality and Status of Aliens Act, 1914, and probably cases of hostility among persons of this class would be rarer than among those of dual nationality. But surely the argument that to deprive such persons of their British status would be to turn them into persons of no nationality is a theoretical objection at best, which ought not, to weigh against Imperial interests. Their British nationality confers upon such persons definite rights of protection, trading, etc., which it seems to me absurd that we should accord to them if they are definitely hostile to us. There may be no necessity for deportation, but there is certainly no necessity for favourable treatment in such cases.

As to the suggestion that our proposal would allow executive action of a tyrannical nature "without anything in the nature of a trial by jury," this can easily be provided against by an inquiry on the lines of section 7 (4) of the British Act.

With regard to our proposal that the naturalisation of persons who have not divested themselves of their status as subjects of a foreign state should be prohibited, the point of our recommendation was that this should be statutory and not left to executive discretion. The only answer of the Home Office is that there is no necessity for this, but they give no reasons for their opinion, nor do they state what are "the objections applicable to a statutory restriction in a matter of this kind." We thought that there were very definite reasons, in that without it particular cases are apt to be allowed to slip through. It is of course a fact that our proposal was only intended to require the applicant to divest himself of his foreign nationality "so far as in him lies," but we believed that this was in fact possible, at all events *sub modo*, in other cases than those of Swiss subjects.

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No. 165.

QUESTION OF EXTENSION OF THE LIMIT OF TERRITORIAL WATERS FOR PURPOSES OF LEGISLATION.

Question whether Palk's straits and the Gulf of Manaar can be declared as Maria Clausa.

(24th November 1919).

It is clear that neither the Local Government nor the Government of India can legislate for any place outside British India. Territorial waters within a marine league from the coast

Department of Commerce and Industry Proceedings Fisheries A., June 1920, Nos 1-2
(Legislative Department unofficial No. 219 of 1919)

are no doubt part of British India. We have always claimed to exercise jurisdiction over them and have in fact done so, and it may therefore reasonably be said that we have "governed" them within the definition of "British India" in section 18 (4) of the Interpretation Act. Moreover the Privy Council have definitely held that the full proprietorship of the *solum* up to this limit is vested in the Crown and subject to Indian legislation (Secretary of State *versus* Chellikani Rama Rao, L. R. 39, Indian Appeals). I know of no ground however upon which it could be maintained that we have "governed" any part of the open seas generally beyond this limit, except possibly in specific localities. The suggestion of the Madras Advocate General that the Indian Legislature has under section 65 of the Act* of 1915 power to a certain extent to make laws for the high seas is, I think, based on a fallacy. The powers delegated to us by Parliament are over "places" and "persons" *qua* "places" our jurisdiction is confined to British India, though *qua* particular classes of "persons" this limit does not apply. The provision of section 66, to which the Advocate General refers, is not an extension of our territorial jurisdiction, but a restriction of the personal jurisdiction in the case of a particular class. If this view is correct it follows that the Local Government must be told that neither they nor we have any power to legislate for coastal waters generally beyond the "3-mile limit."

Whether or not a sufficient case has been made out to take up the question of a general extension of this limit for India, is another matter. It is obviously a large question of policy in which international interests are concerned, and I do not think that Parliament would be likely to help us. It may be however that similar difficulties are experienced in other parts of the Empire and that the much debated question of territorial waters generally

*Government of India Act, 1915.

might be settled by a reference to the League of Nations. I doubt whether in any case a claim to actual proprietorship of the *solum* to a distance of 12 miles from the coast is within the sphere of practical politics, as it might involve concessions which the British Empire would hesitate to make to other nations. I think myself that a general 6-mile limit, with special proprietary rights outside it in particular cases, and possibly protective rights to a further limit, would be the only practical basis of agreement. But it is a very big question, and my own opinion is that there is not much chance of its being raised in our interests—despite our new-born membership of the League.

So far as Palk's Straits and the Gulf of Manaar are concerned it would be reasonable to hold, in view of the decision of the Madras High Court (I.L.R. 27 Madras, 551), that the portions adjacent to our own coasts are parts of British India, and that either we or the Local Government may legislate for them. I doubt however if either of us have power to notify them as *maria clausa*, which is apparently all that Madras proposes to do. If any such declaration is to be made it must, I think, be the direct act of the Crown. If the Local Government presses for this I think that we should address the Secretary of State, and ask that the matter may be taken up in consultation with the Colonial Office.

The papers should probably go to His Excellency in any case under rule 10 of the Rules of Business, and he may perhaps wish them to be circulated. If it is thought worth while we can go to the Secretary of State upon both questions and we might ask.—

- (1) that he should consult the Law Officers as to our power to legislate for open waters beyond the 3-mile limit ;
- (2) if we have power to do so, whether the Foreign Office would object ;
- (3) if we have not, whether Parliament will empower us to do so ;
- (4) failing this, whether there is any chance of the general question being taken up with the League of Nations ; and
- (5) whether as regards Palk's Straits and the Gulf of Manaar a declaration can be made either by the Government of India or by the Crown direct that they are *maria clausa*.

I greatly regret that the case should have been so long delayed in this Department though I fully recognize the difficulty of the legal questions involved.

No. 166.

INTERPRETATION OF HINDU LAW AS REFERRED TO
IN THE *SANADS*.

(*Brandreth on Hindu law of adoption*).
(27th November 1919).

SIR OSWALD Bosanquet's letter suggests that the Hindu law referred to in the *Sanads* may not be what I have spoken of in my previous note as the "general" Hindu Law, and he evidently doubts whether it is politic to assume that this is so. But the term "Hindu law" must have been quite well known in Lord Canning's time as being the law generally applicable to Hindus, and to suggest now that the term was used in the *Sanads* in some other and altogether indeterminate sense would, in my opinion, be a very dangerous theory to propound to the Chiefs at the present time. It is well recognised that Hindu law is a religious law—based essentially on religious tenets and applicable to all persons professing that religion. I know of no reason to suppose that its general principles have not always been as applicable to Chiefs as to their fellow castemen in humbler positions. In the case of impartible Hindu Rajas, the holders of many of which differ only in status from the recognised Chiefs, the general Hindu law has always been applied, except so far as it is inconsistent with the established custom of impartibility, and my own view undoubtedly is that the same doctrine applies to the Chiefs. I think it may also fairly be said that this was the view taken by Brandreth in his adoption

Foreign and Political Department Proceedings Secret I., January 1920, Nos. 1—3.
(Legislative Department Confidential File No. 572).

Political A., July 1870, Nos. 310—315. treatise as is evidenced by his constant references to Manu and other early writers on Hindu law.

No 167.

LIABILITY OF GOVERNMENT FOR ILLEGAL ACTS COMMITTED UNDER ITS ORDERS.

(Question as to the action taken by Government in the Punjab under Martial Law and the Indemnity Act, 1919).

(3rd December 1919).

THE Advocate General's opinion is interesting. It is not for me to criticise it, nor, if it is to be treated as confined to the particular question under his consideration, have I any desire to do so. I am, however, inclined to think that some of the statements in it are dangerously wide, and I am not prepared to accept it as decisive of the general question, which I have discussed with Sir William Vincent, as to the possible liability of Government for illegal acts committed under its orders. This question arose in connection with the action recently taken in the Punjab under Martial Law and the Indemnity Act of last September. The proposition then put forward, to which I was inclined to demur, was that no action for tort in respect of, *e g*, illegal imprisonment under the authority of the Government of India, would lie against the Secretary of State in Council. Mr Das's opinion would not necessarily govern cases of this nature as the question upon which he was asked to advise arose from a mere omission of a Government officer to do his duty.

By the Indemnity Act we have precluded the filing of suits against all "officers* of Government" in respect of torts of certain kinds only. So far as concerns torts to which the Indemnity Act does not apply, the liability of individual officers continues, and they may be left out of account. It seems fairly clear, however, that all torts to which the Indemnity Act applies must be treated as having been committed under the authority of Government, and the question is whether the individuals who have suffered legal injury thereby have now no remedy in respect of them. This seems to resolve itself into the question whether suits can be brought in respect of any of them against the Secretary of State in Council as representing the collective Government. No doubt an action for torts will not lie against the Crown though whether the reason for this is merely that "the King can do no wrong" may be doubted. But it is well settled that the East India Company (in whose shoes

* As to what exactly the term "officer of Government" means, there may be some doubt. Would it, for instance, cover Sir Michael O'Dwyer in his capacity of Lieutenant-Governor and being himself the local Government? Would it again cover His Excellency the Viceroy.

the "Secretary of State in Council" now stands under section 32 of the Government of India Act) though invested with certain sovereign rights was not itself a "sovereign", and did not enjoy all the immunities of the Crown. It is also clear law that the Secretary of State in Council may be sued and held liable for torts committed by persons in the service of Government, though the P. and O. case* in which this was established went no

* P. and O. S. N. Company *versus* Secretary of State, 5 Bom. H. C. R. Appendix A.

further than to decide that this liability attached to the Government in its quasi-private capacity. The Privy Council did not in that case assert the immunity of the Company (and therefore of the Secretary of State in Council in respect of torts committed by it in its sovereign capacity, though this interpretation was undoubtedly put on the judgment in a later case in Calcutta (Nabin Chunder *versus* the Secretary of State, I. L. R. 1 Cal. 11). I doubt, however, if this is correct and the point must in my opinion be regarded as still open. Indeed there is at least one judgment of the full bench of the Madras High Court the other way†, and the decision of the Privy Council in the Badshapore "Arms Suit" (L. R. I. A., Supp. page 10) was given apparently with reference to a tort committed in exercise of the sovereign powers of the Government, and in this case the Secretary of State was held liable.

† I. L. R. 7 Mad. 466.

If the question ever does come to be argued it may be material to consider the dictum of the Privy Council that the civil irresponsibility of Government for torts committed by its officers "could not be maintained with any show of justice if its agents

‡ Rogers *versus* Rajendra Dutt, were not personally responsible for them ‡. If then the legislature has in a particular class

of cases declared the agents not to be responsible, it may not unreasonably be argued that this implies the liability of the Government as a whole, and would allow the Secretary of State in Council to be sued. It must also be remembered that according to Raleigh *versus* Goschen (1898, 1 Ch. 73), in England, where neither the Crown nor, according to Romer J., a department of Government could be sued, yet an action would apparently have lain against Mr. Goschen personally if the tort complained of had been done under his orders or directions. Here where there is a specific provision for suing the Secretary of State in Council as representing the Government, the decision might well be different.

I have no time to pursue this interesting topic, I only desire to make it clear that the larger question to which I have referred in this note is not concluded either by Mr. Das's opinion or the authorities which he cites.

No. 168.

ACQUISITION BY GOVERNMENT FOR COMPANIES UNDER
THE LAND ACQUISITION ACT, 1894.

(8th December, 1919.)

I HAVE always considered that the policy of the Land Acquisition Act, 1894, was to allow acquisitions by Government for companies only in cases where there could be a direct user by the public of the company's undertaking, *e.g.*, gas works, power works, tramways, etc. In my opinion it is only within these limits that acquisition by Government is legitimate. I know that this has not been adhered to in the past and that the provisions of the Act [notably of section 41 (5)] have been evaded in order to allow of acquisition in cases where the public benefit was only indirect and the user of the undertaking was not to be open to the public.

Department of Revenue and Agriculture
Proceedings Land Revenue A.,
October 1920, Nos. 26—28.

(Legislative Department unofficial
No. 1103 of 1919.)

If industrial expansion on a large scale is to be made possible in the future, it is clear that acquisitions of land for this purpose must be facilitated, and that some means must be devised by which companies can compulsorily acquire land without being obliged to allow the public a right of user. When the matter came before the Executive Council some time ago there was some difference of opinion as to the method by which this should be effected, and the only decision then reached was that expressed in paragraph 63 of the third Reforms Despatch, *viz.*, that applications for the acquisition of land in these cases should be brought under the cognizance of the "Legislature" which I take to mean the local Legislative Councils.

My own view was, and is, that the only way in which this can be provided for is by the introduction of *ad hoc* Acquisition Bills. I do not want all the cumbrous procedure of private Bill legislation at home as recommended by the Functions Committee, but I do want to see Legislative Councils made the judges of whether there is a sufficient public interest involved in each particular case to justify the interference with public rights. It may be that the Joint Committee's Report deals with this recommendation of the Functions Committee and it may therefore throw some light upon the matter.

The proposal now put forward in these papers is that the Report of the enquiry under section 40 of the Act and the draft agreement

under section 41, shall be laid on the table of the Council, and (I gather) that if a Resolution of the Council is carried against it the consent of the Local Government to the acquisition shall be refused.

I very much doubt if this is a satisfactory solution of the question. I would much rather see the matter dealt with by a Bill with the draft of the proposed agreement attached. The Bill should be to enable the Local Government to apply the provisions of sections 6 to 37 of the Land Acquisition Act, and for statutory validation of the agreement. There should in my opinion be a Standing Committee of the Council to deal with all such Bills. The Committee's proceedings would take the place of an enquiry under section 40 : it should hear witnesses, but not, I think, counsel ; and it should report to the Council. If this procedure were adopted no amendment of the Land Acquisition Act would be necessary.

If the Act is to be amended I agree that it will be desirable to provide for acquisition by the Government of India, but no difficulty has apparently been felt in the past owing to the absence of a provision to this effect, and I doubt if it is worth doing by itself.

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No. 169.

EXAMINATION OF THE BOMBAY PLEADERS BILL WITH
REFERENCE TO SECTIONS 106 AND 107 OF THE
GOVERNMENT OF INDIA ACT.

(17th December, 1919.)

I FEEL the force of the doubts expressed in the preceding notes,
 (Legislative Department Proceedings but I do not think that at this
 A., December 1919, Nos 16—17) stage we ought to do more than
 suggest the question for the
 Local Government's consideration.

I do not myself think that it touches section 107 of the Government of India Act, which only refers to the superintendence of subordinate courts. Section 106 stands on rather a different footing. It confirms to the High Courts all existing powers (1) under their Letters Patent, and (2) under all other laws which were in operation on 1st January 1916. The Letters Patent powers are specifically saved by clause 31 of the Bill, but the enactments which gave the High Court other powers are to be repealed. I doubt, however, if the mere repeal of these enactments is *ultra vires*, if the powers are re-enacted.

I agree that much of the Bill could be provided for by the High Court itself under the Letters Patent, and I put this directly to Sir Basil Scott when he discussed the Bill with me, but he thought it essential that the position of the pleaders should be defined by legislation and not merely governed by rules. The Bill, or a great deal of it, may be unnecessary, but unless it "affects" the Act of Parliament, it is not *ultra vires*, and I do not feel by any means certain that it will do this.

If we now hold up the Bill and ask the Local Government to reconsider the whole question, we shall be told that the High Court are satisfied that the Bill will not affect their powers under the Government of India Act, and the only result will be the further delay of a measure which, I was told, was urgently needed more than three years ago.

All we can fairly do now, I think, is in replying to their last letter to put the point tentatively somewhat as follows:—

"The Government of India understand that the Local Government have considered in consultation with the Judges whether the Bill will affect the provisions of section 106, and possibly also of section 107, of the Government of India Act, 1915, and they have no desire to do more than to call attention to this question. It will no doubt be observed that section 106 gives statutory confirmation not only to the powers of the High Court under,

their Letters Patent, but also to all other powers vested in them under any laws on 1st January, 1916, and that the Bill proposes to repeal the enactments by which some of such powers were conferred. The Government of India have some doubts whether this is sufficiently provided for by the wording of clause 31 of the Bill, but they feel that this can safely be left for consideration by the Legislative Council."

I agree that we should maintain our objection to the use of the word "accused" in clause 24. The Bill is not merely a consolidating one, and I think that opportunity should certainly be taken to correct what I regard as a pure anachronism. Section 12 of Act XVIII of 1879 has "convicted," and this, I think, should certainly be followed in preference to the older model.

The point referred to in paragraph 4 of Deputy Secretary's note might be put as an assumption.

No. 170.**JURISDICTION OF COURTS IN RESPECT OF SUIT AGAINST
A PRINCE OR CHIEF.***(22nd December, 1919.)*

HAVING regard to the fact that we are just changing solicitors and that Mr. Dunlop¹ will not be available for some weeks after January 1st, I think that we had better advise in the present case.

The suit was instituted before the Chief succeeded to the *Gadi*, and s. 86 of the Code does not provide specifically for such a case. I think, however, that the provision that a Prince or Chief may not be *sued* without consent, covers the continuance of a suit already filed, and that the same remark applies to "shall be sued" in s. 87 "sue" and "suit" in the Code are, I think, correlative terms, and "sue" clearly covers all the proceedings up to decree. So far however the Subordinate Judge has taken the opposite view, and unless the question is argued he will probably decide against the Durbar. I think myself that the best course would be to appoint some one to represent the Durbar under s. 85 of the Code, and to have the question formally argued. The Agent so appointed would appear or instruct counsel to appear under protest and argue that the court had no jurisdiction. The point to be taken would be two-fold both under s. 86 as to want of consent, and s. 87 as to the suit not being in the name of the State. The only alternative to this would be for the Political Agent to refuse to serve the summons, in which case it would be open to the court itself to appoint a guardian *ad litem* and after service by post under Order 5 R. 25, to proceed *ex parte*. The provisions of R. 26 as to service through the Political Agent are only permissive.

¹Lieutenant-Colonel R. W. L. Dunlop, Solicitor to the Government of India.

No. 171.**CREATION OF INDIAN "KING'S COUNSELS."***(28th December, 1919.)*

THE PROPOSAL of the Chief Justice of Allahabād is by no means a new one, but no discussion of it can be traced in the Legislative Department, though I have an idea that I noted upon it myself in some connection or other not very long ago. It was definitely raised when I was at the bar, and I think that Sir Erle Richards, the then Law Member, wrote to me about it. At that time the Bombay bar certainly would have welcomed it, but I have always understood that the suggestion was turned down because the Calcutta bar would only accept it if Indian "silk" was to rank with the home product. This was held to be out of the question, as in the case of all colonies "silk" is only local, *i.e.*, it confers no precedence in the home courts.

Personally, I have no doubt that it would be a good thing in many ways. It would, I think, tend to raise the status of barristers in India; it would afford greater facilities for the introduction of juniors to practice; and it would at the same time help senior men who are not quite in the front rank, and who under existing conditions cannot be briefed with a more successful junior, though their assistance would often be of great advantage to the client.

At the present time in Calcutta, as in other places, the leaders of the bar are largely Indians, who would probably not take the same objections to the proposal as appear to have prevailed a dozen years ago, and I think that there is at all events a considerable chance that the proposal would be generally welcomed.

I think that vakils as well as barristers should be eligible, though possibly in their case the distinction would be more sparingly granted. In Canada many King's Counsels are to all intents and purposes "vakils."

I see that Sir James Fitzjames Stephen¹ says in a minute on "Etiquette among Lawyers," dated the 23rd October 1871, that every Queen's Counsel takes an oath, but I rather think that this is incorrect. At all events I have been unable to find any reference to such oaths either in the schedule to the Promissory Oaths Act (31 and 32 Vict., c. 72) or elsewhere. If an oath is necessary, a

¹A former Law Member.

further amendment of the Indian Oaths Act (X of 1872) would be required.

¶ It will also have to be considered how provision should be made for King's Counsel in India. It would probably be within the competence of our legislature; see *Attorney General for the Dominion of Canada v. Attorney General for Ontario*, 1898, A. C. 247, but the question would require looking into, and it would be as well to consult the Law Officers at home.

I would suggest that the Home Department be asked to consult the various High Courts and to request that the views of representative members of the bar should be obtained confidentially. If the replies are favourable we can then address the Secretary of State.

No. 172.

LICENSE OF A CLERGYMAN TAKING UP A NEW CURACY
OR GOING TO A NEW DIOCESE. SEAL OF THE LETTERS
OF ORDINATION.

(9th January, 1920.)

I AM not an expert in ecclesiastical law and I have no time to go into this matter at all deeply. If the Ecclesiastical Department want a formal opinion, they must wait for Mr. Dunlop¹ and can ask for the Advocate-General's opinion through him.

Department of Education, Ecclesiastical Deposit Proceedings, January 1920, No. 67
(Legislative Department unofficial No. 1227 of 1919.)

In the meantime I record my own views for Mr. Sharp's benefit. The licenses to which his first query relate are presumably what are known at Home as stipendiary curate's licenses. We have no system of regular benefices, I believe, in India, and chaplains are probably regarded as more nearly approaching stipendiary curates than anything else. These licenses I have always understood to be purely diocesan and license the holders to a particular curé only. If the holder leaves to take up another curé in the same diocese his license is usually endorsed for this purpose by the Bishop. But I believe that they have no validity outside the diocese, and that if the clergyman takes another curacy in a fresh diocese, he must apply, to his new Bishop for a new license, and before he can get it has to produce a "*bene decessit*" recommending him to his new Bishop. The object of the license is, I have always understood, to bring the curate under the particular Bishop, and it therefore *ex hypothesi* has no validity outside the particular diocese. But further than this inasmuch as the license is to a particular curé, it does not entitle the holder to officiate anywhere else even within the diocese without the Bishop's consent, which is usually signified by endorsement.

If I am correct in the view I have taken above and a clergyman in India going to a new diocese must be licensed afresh by the Bishop of that diocese, it still remains to apply the principles to a mixed diocese like that of Lucknow where the Bishop is in certain parts only the Commensary of the Bishop of Calcutta. There are, as far as I know, no such cases in England, but it would appear to be fully within the competence of the Bishop of Lucknow to dispense with the necessity for a fresh license when a man only moves to another part of the diocese though technically speaking the Bishop's juris-

¹Solicitor to the Government of India.

diction there may be founded on a different title. In my opinion there is a license granted by the Bishop for a curé in any part of the Diocese of Lucknow can be effectively endorsed for a curé in any other part of the same diocese, whether in the administered area or in the diocese proper ; but that if the clergyman goes into another diocese, under the jurisdiction of another Bishop altogether, he will require to be licensed anew.

I do not know what the *practice* in Indian dioceses is, but I assume that they follow what I believe to be the ordinary practice in England; and that the Bishop of one diocese will not endorse a license granted in another diocese.

I agree that the answer to Mr. Sharp's second query should be that letters of ordination should in all cases bear the seal of the ordaining Bishop. Ordination is an act flowing from the personal ecclesiastical authority of the individual, and this should be testified by his corporate seal.

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No. 173.

PROCLAMATION ISSUED TO THE GOVERNOR GENERAL
WHEN HE ASSUMES HIS OFFICE.

(Construction of the power of pardon granted to him under the proclamation.)

(10th January, 1920.)

THE WORDING of the Proclamation appears to me to indicate the exercise of the Royal prerogative and not the power of the Governor-General in Council under section 401 of the Criminal Procedure Code. The Royal prerogative is essentially one of pardon, as opposed to remission, though it may be granted upon conditions.

It is impossible for us to say how the Judicial Commissioner will act in pending cases where the appellants have been pardoned. Personally I should think that they would be only too glad to get out of the predicament in which they were placed by the preliminary pronouncements of two members of their body, and that they will refuse to go on and hear the appeals, and I doubt if the appellants will object.

No. 174.

GOVERNMENT OF INDIA ACT.

[Construction of section 92(4) as regards the amount of salary permissible to a conditional or temporary successor of a member of the Executive Council.]

(17th January, 1920.)

I FEEL very doubtful about this. Personally I think that section 92 (4) limits the payment to half the salary of the absent members, and that the Home Department Proceedings Establishments A., April 1920, Nos. 77—79. {Legislative Department unofficial Secretary of State has no discretion in the matter. If he has, it must be an unlimited one, as I do not think that the second Schedule can apply to temporary members of Council. It is however desirable that there should be a discretion to deal with such cases and as Deputy Secretary and Mr. Duval* both hold that an additional payment could be authorised, I think that the case might well be put to the India Office who may wish to take the opinion of the Law officers on the point. It seems to me strange that the question had not risen before. So far as hardship in the particular case goes, I presume that the Khan Bahadur accepted the office knowing what the salary would be, and there were no doubt other attractions to him.

* Joint Secretary in the Legislative Department.

No. 175.

EFFECT OF THE ROYAL AMNESTY PROCLAMATION ON
THE SECURITIES DEPOSITED UNDER THE PRESS
ACT.*(27th January, 1920.)*

I DO NOT feel very clear about this case. I am not sure that (Legislative Department unofficial a mere forfeiture of security No 134 of 1920 Confidential File taken and as under section 4 of No 585.) the Press Act (1 of 1910), is an offence "against the King's peace," which he could pardon, or at all events whether a "pardon" would be the appropriate remedy. I am not, however, prepared to say that a pardon would be inapplicable, and if granted it would, I think, in the absence of any legislative enactment to the contrary, purge the offence, and put the offender in exactly the same position as if the penalty had not been inflicted, so that section 5 of the Act would not be applicable. I do not think that this section can be read as intended to override a pardon, a contingency which had probably never been contemplated when the Act was passed. If His Excellency is prepared to pardon, the keeper of any press whose security has been forfeited, I think that executive instructions should be issued that the provision of section 5 should not be enforced, but I cannot help thinking that the issue of a pardon in such a case, unaccompanied by a refund, would savour somewhat of Gilbertian justice.

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No. 176.

INVESTMENT IN CO-OPERATIVE SOCIETIES OF TRUST
FUNDS HELD BY GOVERNMENT.*(2nd February, 1920)*

I AGREE with the views of the Department of Revenue and Agriculture. If Co-operative Societies are proper securities for trust investments, they should be so recognised by section 20 of the Trust Act. If they cannot be regarded as proper trust investments, funds which Government holds in a fiduciary capacity ought not to be invested in them. We amended section 20 of the Trust Act not long ago to let in debentures of the Central Co-operative Bank in Bombay upon which the interest is guaranteed by the Secretary of State, and this shows the limit within which such investments should be permitted. The Bill seems to have been proposed purely in the interests of the Co-operative Societies, and in my opinion should not be allowed. Its introduction is not a very hopeful augury of legislation in the Reformed Councils!

No. 177.

GOVERNMENT OF INDIA ACT, 1915.

[*Question whether the provisions of section 105 (2) as regards appointment of acting judges of High Courts, are governed by section 101 (4) of the Act.*]

(5th February, 1920.)

I THINK that we ought to get away definitely from the (to my mind) very inconvenient view based upon Sir Andrew Scoble's* note of the 11th March 1889, though I notice that his doubts were also shared by Sir Ali Imam* a quarter of a century later. I always desire to follow the opinion of my predecessors wherever possible, but in this case I cannot bring myself to feel any doubt on the question and the result of following these particular opinions is, I think, mischievous.

In my opinion the provisions of section 105 (2) of the Government of India Act, 1915, are not subject to section 101 (4) of the Act, or in any way governed by it. There is to my mind nothing in section 105 (2) to suggest this, but rather the contrary. If section 105 (2) had been governed by section 101 there would have been no need in the former sub-section to provide specifically that a person to be appointed as an acting judge must have the qualifications required in persons to be appointed to the High Court, *i.e.*, in the case of appointments under section 101. Again it has, I believe, always been accepted that an acting Chief Justice need not be a barrister. There have been several such appointments made in my time, yet if section 101 governs section 105 (2), it must equally, in my opinion govern section 105 (1). I admit that there is a difference of wording between the two sub-sections, but it is not, in my opinion, sufficient to support the argument that section 101 governs the second but not the first of them. Finally the two sections are not in *pari materia*. Section 101 deals with appointments of permanent judges by His Majesty: section 105 deals with acting appointments by the Governor General in Council, or the local Government, what may be a reasonable limitation in the one case, may not be so in the other and indeed is not. There are very obvious objections to temporary appointments from the bar, which would be necessitated in most cases by the acceptance of Sir Andrew

*Former Law Member.

Scoble's view, but these have no application to permanent appointments. Feeling as I do, that there is no reasonable doubt upon the point, and finding myself supported by a considerable volume of authority, I cannot think that I should be justified in advising the continuance of system which I regard as mischievous, merely because of doubts expressed by two of my predecessors in office, however great my respect for them may be. I desire therefore formally to record my opinion that in making an acting appointment under section 105 (2) there is no necessity to have regard to the provisions of section 101 (4).

No. 178.

PREVIOUS SANCTION OF GOVERNOR GENERAL TO
LEGISLATION AFFECTING HINDU LAW.

[*Construction of section 79 (3) of the Government of India Act.*]
(3rd March, 1920.)

IT HAS always been held in this Department that the Hindu Law is so bound up with the Hindu religion that any Bill which proposes to alter the personal law of Hindus requires the previous sanction of the Governor General under section 79 (3) (e) of the Government of India Act, 1915, and I think that the same ruling must be applied in the present case. It may be that this is a case in which sanction should be granted. But that is another question and raises the point which has been discussed on several previous occasions whether it is desirable to allow local alteration of the Hindu Law. I think that all we can do in the present case is to tell the Local Government that sanction is necessary, and that the Bill cannot be introduced without it. We have always considered that even a motion for leave to introduce is barred by the words "make or take into consideration" in section 79 (3), though the words used are somewhat obscure.

No. 179.**INTERNED CIVILIANS AND PRISONERS OF WAR.***(Recoupment of maintenance charges of interned civilians)**(14th March, 1920.)*

I FULLY agree that interned civilians are not prisoners of war, and that the Contracting Parties have not specifically waived repayment of maintenance charges.

Army Department (Adjutant General's Branch) Proceedings.
(Legislative Department unofficial No. 575-P.T)

I also agree that we ought to be entitled to repay ourselves out of the liquidated proceeds of the property of German nationals any advances we have made to them for their maintenance. If these sums had been paid at the time of the liquidated proceeds or had been debited to them, I should feel no difficulty on the point. But as a matter of fact the advances were not so made or debited, though there may, no doubt, have been an undefined intention to repay ourselves in some way out of enemy property. There must, however, I imagine, have been many cases in which such advances were made where there was not property belonging to the individual to which we could look for repayment, or where advances were made regardless of this.

I can find nothing in the Treaty (nor has Mr. Brown* been able to point to any provision) which specifically provides for such repayments, and it appears to me that unless we can say that the "not proceeds" of liquidation must mean the proceeds after deduction of all allowances or payments made to German nationals, it is difficult to see how we can justify the proposal under the terms of the Treaty, and I think therefore that before Government can be advised to do this we ought to communicate with the Secretary of State and ask whether there would be any objection to it.

* Officer in the Peace Treaty Branch of the Legislative Department.
MC42LD

No. 180.

LIABILITY OF AN EXECUTOR OR ADMINISTRATOR AS
SUCH, FOR SUPER-TAX.*(26th March, 1920.)*

I DISAGREE altogether with the view that the "estate" is (at all events in equity) liable to pay super-tax on the ground that the dead man lives on in the person of his executor. The executor is nothing but a conduit pipe for the beneficiaries under the will, and the same applies to an administrator on intestacy.

Finance Department Proceedings
Separate Revenue A., June 1920,
No 102.
(Legislative Department unofficial
No. 79 of 1920.)

Where an estate as a whole has been super-taxed, I think that refunds of the tax ought to be allowed to any beneficiary *pro tanto* if his total income does not come up to the super-tax scale which has been applied to the estate.

This question will not arise under the new Act, at all events in the same form but the principle stated above should in my opinion be applied if it does.

When orders are issued, perhaps Finance Department would send a copy to the Advocate General in fulfilment of the promise in my letter of January 17th (see last sentence.)

No. 181.

STEPS TO BE TAKEN TO BRING THE LAW AND REGULATION IN INDIA INTO CONFORMITY WITH THE HAGUE OPIUM CONVENTION OF 1912.

(13th July, 1920.)

In my opinion India is not a high Contracting Party under the German Treaty. The High Contracting Party is the British Empire as represented by His Majesty. Under article 295 the British Empire has, as I read the treaty, agreed that it will bring the convention into force throughout the Empire, and will for this purpose enact the necessary legislation within 12 months. The British Empire has not signed the convention in the plenary sense contemplated by the Treaty: It was only signed by "Great Britain" on behalf of certain limited parts of the Empire including British India. The convention has therefore now to be signed and eventually ratified, on behalf of the Empire as a whole of which I think that the Indian States are definitely parts. Article 295 also seems clearly to necessitate legislation in the States. The Government of India cannot of course legislate for them, and I doubt if even Parliament can do so; and to insist on legislation in every State in India seems to be an impossible task. It is therefore clearly necessary to refer the matter to the Secretary of State, but I do not think that the draft telegram quite puts the point. Perhaps Mr Duval could put up a redraft for consideration in Foreign and Political.

I have always thought that we should be faced with concrete questions of this sort, and have from the first realised that there might be great difficulties in the way of bringing the Indian States under the obligations which the treaty seems to imply. I can only hope that I am wrong in my interpretation of the Empire's liabilities in this respect. In any case the question is one of great importance to us, and the sooner it is authoritatively pronounced upon by the Home authorities the better. I agree with Secretary that similar questions will probably arise in respect of labour legislation, and it may be that the difficulties are the same under the other treaties.

No. 182.

(I—II.)

GOVERNMENT OF INDIA ACT.

(Question of amending section 33 to authorise the Viceroy to deal with certain classes of cases relating to Indian States, independently; of his Council.)

I.

(15th July, 1920)

I have now discussed this question with Sir John Wood, and Foreign and Political Department I suggest that it is of sufficient importance to be brought before Council.
 Proceedings Deposit—Reforms (Secret) September 1921, No. 14.
 (Legislative Department unofficial No 148 of 1920).

It seems clear that Parliamentary legislation will be necessary if all matters connected solely with the internal administration of Indian States are to be entrusted as there can be no question the Chiefs desire that they should, to the Viceroy. The legal position is made quite clear in the preceding notes, and I think that the first section of the Government of India Act is confirmatory of Mr. Muddiman's opinion. To effect the necessary change I think Section 33 would have to be amended by the addition of a proviso to the above effect. It might be necessary to schedule the particular matters to be dealt with by the Viceroy, but I think myself that a mere proviso in general terms would be preferable.

I also think that it might be suggested to the Secretary of State that the Governor General when appointed by His Majesty, should also be formally appointed Viceroy. It is a curious fact that Lord Canning is the only Governor General who was actually so appointed, though it is clear that many of the prerogatives of the Crown have always been exercised by the Governor General as His Majesty's direct representative, and now that the prerogative of pardon has formally been committed to him it seems to me desirable that the Viceroyalty should be specifically recognised. It may be noticed that in the Warrant of Precedence which issued under the direct authority of the Crown item I is "Governor General and Viceroy of India" which seems to be a definite recognition of the Viceroyalty, though this is, as far as I know, the only instance of it.

II.

(20th August, 1920)

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I am personally strongly in favour of making over to the Viceroy, as the direct representative of His Majesty, all questions concerning the internal affairs in Indian States which do not directly affect the administration of British India. The Ruling Chiefs all want this, and if we are to be able to consolidate the Indian Empire, which is to me of the greatest possible importance at the present time, I feel that we must carry them with us. They are not prepared to have what they regard as their private affairs submitted to the judgment of a popular government in British India, and if the severance is not effected now, it never will be. My Hon'ble Colleague, Mr. Hailey, I think, recognises that this may be necessary in the future, but I would press upon him that when we have once attained popular government the change would be politically impossible. All the matters to which I refer concern the suzerainty and that is to my mind definitely a relationship between the States and His Majesty. It is only owing to historical reasons, I believe that the present position has come about, and the change I advocate ought, in my opinion, to have been made when the Indian Empire was constituted in 1870. It is not, I am convinced, with the Princes a mere attempt at aggrandisement, but is due to a general fear of the effect of popular government of India upon the rights and privileges which we have guaranteed to them. In practice these methods are dealt with by the Viceroy, and not by the Council only cases of "Indian", importance being referred to the Council, and I for one, should like to see this regularised by a short amendment in section 33 of the Government of India Act. Many of the questions involved are very delicate ones, entirely unsuited for discussion in Council, and it is only owing to the personal influence of the Viceroy that the decisions are, as a rule, so quietly accepted. If there was any attempt to enforce them as orders of the Government of India, there would be great discontent and constant trouble.

No. 183.**ALLOCATION OF BERAR REVENUES TO THE CENTRAL PROVINCES GOVERNMENT.**

[Proposed amendment of section 72-D, of the Government of India Act with a view to provide for inclusion of Berar under sub-section (2) (b).]

(24th July, 1920.)

I AGREE generally. The only real difficulty I see is in the word "Province" in section 72-D, (2) proviso (b). This can only refer to the Central Provinces and it would not enable the Governor to authorize expenditure which was only necessary for the safety or tranquillity of Berar, *e g.*, additional police. Cases in which this power was necessary, and not falling under proviso (a) "or the last words of (b) *viz.*, for the carrying on of any department" would be very rare, and I doubt if it is essential to provide for them. I imagine that in any real emergency the Government of India could step in, and any expenditure which it was forced to make could be recouped at all events out of the Berar revenues for the next year before they were allocated to the Central Provinces Government. In view of this possibility it might be as well to leave room for this in the allocation rule under 45-A. (1) (b). Proviso (b) to 72-D (2) could be made watertight by adding after the word "Province" some such words as "or any territories administered therewith."

No. 184.

GRANT OF COMPENSATION TO MR. C. G. TODHUNTER,
C.S.I., I C.S., OF MADRAS EXECUTIVE COUNCIL UNDER
THE PROVISIO TO SECTION 96-B (2) OF THE GOVERN-
MENT OF INDIA ACT.*(27th July, 1920.)*

I DOUBT if the expression "existing rights" in the section was intended to be confined to bare legal rights, or ought to be so construed by us. The intention was, I think, to provide for compensation in all cases where a Civil Servant suffers loss from the operation of the Reforms Scheme, the amount of compensation being in the discretion of the Secretary of State. This limitation and the fact that the right to pensions is separately provided for certainly suggests to me that the proviso is to be construed at all events with reasonable liberality. No doubt Members of a Governor's Council hold office only during His Majesty's pleasure, but the five years' tenure of office has been the recognized rule for a very long time.....I believe for more than a century. It is referred to as the established practice in paragraph 5 of Sir C. Wood's well-known despatch of 9th August 1861, Mr. Todhunter was appointed to the Madras Council before it was known that the number of European Members was to be reduced. He was then entitled to assume that subject to good behaviour and health he would hold the appointment for 5 years. In my opinion we ought to construe the proviso to section 96-B (2) as covering "rights" of this sort, and Mr. Todhunter if this office is abolished ought to receive such compensation as the Secretary of State in Council may consider just and equitable.

No. 185.

POWERS OF THE GOVERNMENT OF INDIA IN RESPECT
OF COMMUNICATIONS FROM LOCAL GOVERNMENTS
TO THE SECRETARY OF STATE.*(13th August, 1920.)*

THE LEGAL position is, in my opinion, correctly summed up in the Home Department Proceedings Secretary of State's despatch of Judicial A., November 1920, Nos. the 29th February 1872, and 206—216. the orders of the Government

(Legislative Department unofficial of India contained in the No. 1054 of 1920). Secretary's letter of the 17th.

Judl. A., June 1872, Nos. 397-398. June 1872. The course laid down in paragraph 2 of this letter appears to me to be the correct one and to cover the present case. The Government of India can only have power to refuse to forward a communication from the Local Government to the Secretary of State if they have been specifically authorized by the Secretary of State to do so. The right of Presidency Governments to communicate direct with the Secretary of State has been well recognized since the days of the East India Company—see 33 Geo. 3, c 52, section 22, but under section 45 (1) of the Government of India Act it is, in my opinion, clear that the Government of India have power to prescribe the procedure as they have done in their letter of 17th June 1872: above referred to.

No. 186.

PRACTISING BY RETIRED HIGH COURT JUDGES IN
COURTS OVER WHICH THEY HAD JURISDICTION OR
SUPERVISION.*(11th September, 1920.)*

I ENTIRELY agree with the main proposal that some steps should be devised to prevent retired High Court Judges from practising in any courts over which they have had jurisdiction or supervision, but I think it should not go further than this.

Home Department Proceedings
Judicial A., September 1920, No. 218.
(Legislative Department unofficial
No. 1219 of 1920.)

I should personally prefer to see this effected by a condition to this effect being embodied in the Pension Rules.

MC42LD

No. 187.

PROVIDENT FUND ACT, 1897.

[*Proposal to increase the limit of deposit for the purposes of section 3*
(1) (a).]

(21st September, 1920.)

I do not think that what is required can safely be done
Railway Department, Proceedings with amending the Act. In
December 1921, Case No. 146-F.-17 my opinion section 3 (3) of
—1-30. the Act would not validate
(Legislative Department unofficial the Act would not validate
No. 1072) a rule of the kind suggested.

Section 4 (2) vests in the widow or children any sum (*i.e.*, sums over or under Rs. 2,000) free from any claim by creditors, but an heir or nominee who was not a widow or child would apparently take subject to debts, and to hand over the money in such a case without the production of probate or letters of administration might defeat the rights of creditors.

I should see no objection to an amendment of the Act to increase the limit under section 3 (1) to Rs. 5,000 for the purposes of section 3 (1) (a), but I doubt if the increased limit should be applied to (b). It would not be unreasonable to allow the payment of sums not exceeding Rs. 5,000 to persons entitled to receive the money under the rules, or to a person nominated in writing by the depositor, without the production of probate or letters of administration but if there is no such claimant, I doubt the wisdom of allowing the wide discretion under section 3 (1) (b) in the case of the larger sums.

I have had so many cases of difficulty under this Act that I cannot help agreeing with Deputy Secretary that the time has come to overhaul it generally. It is, in my opinion, badly drafted and full of pitfalls. The question of assignments has come up over and over again. In one case I believe Macleod J. in Bombay has held that an assignment of a depositor's interest in a fund can only be made after he has ceased to be a subscriber. My own view however is that inasmuch as the Act only provides that attachments and the claims of the official assignee or a receiver shall not operate against compulsory deposits, assignments at all events when there are no widows or children, are left untouched, and that, except in cases covered by the Act, officers in charge of these funds will be affected by notices of assignment in the same way as in other cases. It is, in my opinion, desirable that the Act should provide that such officers should not receive notices of assignment, at all events, until the subscriber has completed his service, and should not be

affected by such notices. This is, I believe, provided by many Provident Fund Rules, but it is at least doubtful whether it is valid in law. Again, in another case, I think, Jenkins, C. J., held that even after a subscriber had completed his service, and was entitled to receive on demand the sum standing to his credit, it was still a compulsory deposit within the meaning of the Act, and therefore still liable to attachment. I see no reason however why any protection should be given under such circumstances. The object of the Act is mainly to provide for dependants in case the employé dies during his service. Once the money has become his absolute property, it ought, in my opinion, to be liable to attachment for his debts, or to go to the official assignee in case of his insolvency. There are many other points in which I think the Act needs revision. Probably, a reference to the Government Solicitor, who has I know recently been dealing with various problems under it, would lead to their elucidation.

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No. 188.

DISPOSAL OF THE PROCEEDS OF THE PRE-TREATY
LIQUIDATIONS.*(4th October, 1920.)*

IF WE are to act on the opinion of the Law officers, all these questions as to what we can pay out of the proceeds of pre-Treaty liquidations answer themselves. The whole of these proceeds can be dealt with in any way that the Governor-General in Council may direct. But even if we do not for the moment accept the opinion as conclusive, I doubt if there is any necessity for a rule under the Enemy Trading (Winding-up) Order. I think that the India Order in Council would itself be a sufficient protection, as Article 297 (d) makes all "exceptional war measures" and all acts done under them "final and binding" and under paragraph 3 of the Annex "exceptional war measures" include all administrative measures which may be taken in the future with regard to enemy property, and "acts in the execution of these measures" include all departmental orders of Government. I do not think that anything will be gained by deferring the consideration of this particular question, and I think that the orders of Government should issue for the expenditure referred to in this file being recouped from the proceeds of war liquidations with the custodian.

No. 189.

(I—II.)

TRIAL OF MATRIMONIAL CAUSES BY YOUNG OFFICERS

(Proposed withdrawal of local divorce jurisdiction from British Baluchistan and Quetta.)

I.

(9th October, 1920.)

I THINK it would be a great mistake to invest young and comparatively inexperienced officers with original jurisdiction in matrimonial causes. Cases under the Indian Divorce Act include not only divorce cases of the more usual kind, but nullify cases, and restitutive cases, though these are no doubt unusual in India. I think there are obvious reasons why young men should not be selected for the trial of questions of this sort. In old days such matters could only be investigated in the ecclesiastical courts. The first Civil Divorce Court was only established in England in, I think, 1858 and was merged in the Probate and Divorce Division of the High Court in 1873, but the court has always been presided over by a very senior judge.

Quite apart, however, from these considerations, I think that the difficulty and importance of the questions that come up for decision under the Indian Divorce Act point to the necessity for rather exceptional knowledge of law and experience in any Divorce Judge. The Act itself is a very difficult one. marriage law generally is a most complicated subject: the constant danger of collusion between the parties calls for the most anxious consideration. pleas of connivance are by no means infrequent and when raised may give great trouble to the judge. the discretion to grant or withhold relief where the petitioner has been guilty of adultery requires the most careful exercise. On the other hand, the importance of any decision of the nature of an *in rem* decree, affecting the status of husband and wife, and if may be of a child, can hardly be exaggerated. Questions of the custody of children too are constantly arising, of alimony, of settlements and of damages; and the judge of an Indian Divorce Court is expected to be familiar with the principles and rules upon which similar courts in England give relief.

I have often heard our Indian Act criticized as conferring jurisdiction upon judges who have neither the knowledge nor experience to deal adequately with the peculiar intricacies of matrimonial law,

but I have never heard it suggested before that a young civilian of 6 years' standing and without any particular legal experience, is competent to preside over a court where divorce cases are apparently the *pièce de résistance*, and I should myself greatly deprecate such an appointment. The facts stated in Colonel Dew's letter seem rather to call for the delegation of a senior District Judge with special experience of this branch of the law.

I should like to add that I have consulted Mr. Duval,* who has had considerable judicial experience, upon this question, and he is of opinion that it is undesirable to confer this jurisdiction upon anyone of less standing than the average District Judge.

II.

(11th October, 1920.)

At present divorce cases are tried in Quetta by the Deputy Commissioner as the "District Judge" under the Indian Divorce Act, 1869. Under section 10 of the Act, read with section 3 (3), divorce petitions can only be entertained by the Deputy Commissioner in cases where the husband and wife reside at the time of presentation or last resided together, within the local limits of the Deputy Commissioner's jurisdiction, i.e., presumably in British Baluchistan. The foundation of the Quetta Court's jurisdiction in these cases is not necessarily the local residence *at the time* of the parties, and it is at least probable that in many cases one, if not both, of them would have gone elsewhere. Under section 10 of the Act there is always an alternative right to present the petition to the High Court, which, in the case of British Baluchistan, is the High Court at Lahore. Where the parties actually reside at the date of presentation in Quetta, no doubt to compel them to go to Lahore and to take local witnesses there from Quetta (a distance of probably 350 miles) would cause considerable inconvenience and in many cases hardship. Presumably the cases tried in Quetta arise mainly among the English military population, and their transfer to Lahore might also seriously interfere with military duties. I do not, however, know sufficient details to be able to say definitely whether these difficulties would in practice be very great or not, and I think that a reference on the subject would be necessary to the Judicial Commissioner, and probably also to the Army Department before this step was taken.

To effect the withdrawal of local divorce jurisdiction from Quetta it would only be necessary to amend the notification applying.

* Joint Secretary in the Legislative Department.

the Indian Divorce Act to the Baluchistan Agency tracts. The amendments involved would be considerable in detail, but would not be a matter of any great difficulty.

Probably there is no necessity to deal with this question in British Baluchistan, as most of the cases seem to come up in Quetta which is in the Agency tracts. But this question might also be referred to the Judicial Commissioner. If the local divorce jurisdiction is also to be withdrawn from British Baluchistan the necessary amendments would have to be made in their Civil Justice Regulation (IX of 1896)

No. 190.

JURISDICTION OF CRIMINAL COURTS IN RESPECT OF
RULERS OF INDIAN STATES.*(Case of the Maharaja of Kolhapur.)**(26th October, 1920.)*

THE QUESTION involved is one of considerable importance, (Legislative Department unofficial and I think that all the known No 1380 of 1920.) precedents have been referred to. If the matter stood to be determined solely by the Indian Statute law, I think it would be clear that no rulers of Indian States are exempt from the process of criminal law in respect of offences alleged to have been committed by them in British India. In the matter of civil courts exemption is specifically provided for by the Code, but no similar exemption finds a place in either the Penal Code or the Criminal Procedure Code. In the case of the former it would appear from the report of the Law Commissioners (see the passage quoted at page 13, paragraph 25, in Gour's Penal Law of India, Volume I, edition 1909) that the omission was intentional. How far, however, this doctrine can be pressed may be doubtful, as it would seem equally to include foreign sovereigns and ambassadors to whom by general international law the privilege of exemption from the process of all courts is invariably accorded. In England this is provided for by the Statute 7 Anne, cap. 12, but this statute can hardly be said to be part of the general law of India.

In the case of the Gaekwar of Baroda the English Courts have definitely held him exempt from civil process [see *Statham versus Statham*, (1912) Prob. Div., page 92], and inasmuch as the present case is actually before a Criminal Court in India it may be that the court will follow this decision in the case of the Maharaja of Kolhapur, though the two cases are not by any means *in pari materia*. The opinion of the Secretary of State which was followed by Bargaive-Deane J. in *Statham versus Statham* was given in a previous unreported case (*Emmanuel versus the Gaekwar*) on a reference by Lush J. under section 4 of the Foreign Jurisdiction Act, 1890, which makes the Secretary of State's decision upon such a reference final. The section appears to be applicable to all Courts in India, and would justify a reference to the Secretary of State in the present case, but would not, I think, justify a reference to the Government of India. There is, so far as I can discover, nothing in the Evidence Act which would justify such a reference, or at all events make the opinion of the Government of India decisive of the Maharaja's status. Under section 57 (8) of the Evidence Act the Court is bound to take judicial notice of the existence of every State or

sovereign recognised by the British Crown, but presumably the fact of such recognition would have to be proved in the ordinary way by oral evidence, if no sufficient statement of the fact could be produced from any book or document. No doubt in this connection the Kolhapur treaties would be material but not necessarily conclusive. (see the judgment in *Lachmi Narain versus Raja Partab Singh*, I. L. R., 2 Allahabad, at page 17). In the Sultan of Johore's case [(1894) I. Q. B., page 149] a reference was made on a similar question to the Colonial Office, and in Lord Esher's opinion "an authoritative certificate of the Queen through her Minister of State as to the status of another sovereign is conclusive in the English Courts." Probably, however, this reference was made under the Foreign Jurisdiction Act above referred to, though no mention of the fact is made in the case.

Since the matter is actually before the courts it must be left to their decision, but it is, I think, extremely undesirable that such questions should be litigated, particularly in any inferior court, and I feel no doubt that legislation on the point is desirable, though what exact form it should take will need careful consideration. Probably some adaptation of the law laid down by section 4 of the Foreign Jurisdiction Act, making the Governor General in Council the deciding authority, would meet the case. It seems a pity that the point was not pursued in 1873, as legislation may be more difficult under existing conditions.

I do not see how the case can well be stopped, though I confess that I should be glad if this were possible. Section 249 of the Criminal Procedure Code allows a magistrate in certain cases to stop proceedings "instituted otherwise than upon a complaint," but presumably this section would have no application to the present proceedings. I think, however, that any magistrate would be wise in such a case in refusing to issue process in the first instance against a person in the position of the Maharaja. If the complaint were tried as against the other persons charged, it would at all events be possible to know whether there was any substantial ground for the Maharaja's implication.

MC42LD

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No. 191.

RECOGNITION BY ENGLISH COURTS OF DIVORCE
DECREES PASSED BY INDIAN COURTS.

[(2nd November, 1920.)]

THIS question is an old friend and I have in the course of my
 (Legislative Department unofficial past practice at the Bar seen
 No. 1428 of 1920) contrary opinions given by the
 most eminent legal authorities.,

There is no doubt that it is now settled law in England that the
 courts there will not recognise a divorce granted by the court of a
 foreign country unless the married pair were domiciled there in the
 strict sense This doctrine has been applied to a divorce granted
 in Ceylon, but never so far to a divorce granted by an Indian Court
 under our Act of 1869, and the question is whether this Act having
 been passed under (it must be assumed) the sanction of Parliament
 ought not to be accepted by the English Courts as having extra terri-
 torial effect. I am very glad that the point, will now come up for
 authoritative decision in the Courts at home, so that this vexed
 question can be finally settled If our Act is held to have no extra
 territorial effect we must clearly ask for Parliamentary legislation
 as the position of India with its constantly shifting English popula-
 tion puts on a different footing to the Colonies. Nothing could
 be gained by a long disquisition on this interesting subject. Pretty
 well all that can be said upon it will be found in note 14 of the appen-
 dix to Dicey's Conflict of Laws, 2nd edition, page 880.

No. 192.

MEASURES FOR PUBLIC SAFETY AGAINST FAILURE OF
DAMS OR RESERVOIRS CONSTRUCTED BY PRIVATE
AGENCY OR IN INDIAN STATES FOR THE DEVELOP-
MENT OF WATER POWER.

*(Question of protection of British interests against dangerous structures
in Indian States.)*

(5th November 1920.)

I think the question of the protection of British Indian interests against possibly dangerous structures in Indian States Department of Industries and Labour Proceedings, Civil Works—Irrigation—B. (Print) May 1923, Nos. 1—3, will require further consideration. The disaster to the Tigma Dam in the Gwalior State must be a warning. It may well be that the Suzerain Power has the right to protect its subjects against such dangers and that such protection is rather an “Empire” interest, than a matter concerning only the internal administration of the State. In any case, I think that the States would be quite ready to agree to expert inspection of any dam, the bursting of which might cause damage either to British India or a neighbouring State. It should not be difficult to make them understand that such inspection would be greatly to their own advantage. It is, I think, impossible to accept the position that the maxim *sic utere tuo ut alienum non laedas* has no application to an Indian State, and that whatever damage they do by the erection of dangerous structures, they cannot be made responsible in damages. Even under international law it is generally recognised that “no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. (See Oppenheims International Law, 2nd Edition, Volume I, pages 243-244).

No. 193.**SIGNIFICANCE OF THE INSTITUTION OF THE CHAMBER
OF PRINCES.***(5th November, 1920.)*

I AGREE with the main idea of Secretary's note, but I doubt if it would be wise to tell the Chiefs that the joint building should be a reminder of the powers which the King-Emperor exercises over them, as this might suggest that the object of the Council of Princes was coercion of the States. I would rather put it that the joint building was symbolical of the united interests of British India and the India States, of the two-fold allegiance which Princes and peoples owe to one King-Emperor, and their common desire to work towards one great end. I should myself like to see the idea elaborated that this ceremony represents only the working out of one great purpose of which Queen Victoria laid the foundations by the Proclamation of 1876, viz., the unity of the Indian Empire. It was then said that India was thenceforward to be governed by Her Majesty and in Her Majesty's name. So again in His Majesty the King's announcement at the Delhi Durbar in 1911. "It is our earnest desire that these changes may conduce to the better administration of India": "The welfare and happiness of the Indian Empire", etc. To my mind Delhi was to be the capital not merely of British India, but of the Indian Empire, and the coming ceremony only puts the King-Emperor's seal upon a consistent policy since 1876. I will only add that I do not think the speech on this occasion should be a long one.

MC42LD

No. 194.

POWER OF A RULING CHIEF TO SUE IN BRITISH INDIAN COURT.

(9th November, 1920.)

I DO NOT think we need trouble Colonel Dunlop¹ with these papers. I feel no doubt that a Ruling Chief can sue, like any one else in our civil courts, and there must be many cases in which Chiefs have so sued.

Foreign and Political Department
Proceedings Internal Deposit, December 1920, No. 17.

(Legislative Department unofficial
No. 1446 of 1920)

There is nothing so peculiar to the law of libel which would prevent a Chief from bringing an action for libel. I believe there was a libel suit filed in the Bombay High Court before I came out to India in which the Maharaja of Bhavnagar was the plaintiff. This must have been somewhere about 1890 and the Foreign and Political Department may have some record of it. The fact that a suit can only be brought in our courts under special conditions *against* a Ruling Chief, is no reason for suggesting that they cannot themselves sue.

I also know of no reason why a Ruling Chief should not take proceedings under Chapter XXI of the Indian Penal Code for defamation where the offence is committed in British India.

¹ Solicitor to the Government of India.

No. 195.**EXEMPTION FROM STAMP DUTY OF DECLARATIONS
UNDER ELECTORAL RULE 11 (2) APPOINTING ELEC-
TION AGENTS.***(18th November, 1920.)*

I AGREE that Rule 46 as to the interpretation of the Rules has no application. It is also, Reforms Office Proceedings French, November 1920, Nos. 188—192 I think, clear under Rule 29 that the only remedy is an election petition. Colonel Dunlop has just shown me the Advocate General's opinion which is to the effect that a declaration under Rule 11 (2) does not require a stamp. Under these circumstances, we cannot exempt the documents from stamp duty under section 9 of the Stamp Act I think, however, that it might be as well to notify under section 33 (3) of the Stamp Act (II of 1899) that a Returning Officer is not a person in charge of a public office for the purposes of this section. He clearly ought to have nothing to do with stamp questions his duty should only be to see that the declaration had been duly made and signed. It is probably due to the regulations made by the Local Government that this unfortunate ruling has been given.

No. 196.**TRANSFER OF APPEALS FROM THE FILE OF A SESSIONS JUDGE TO THAT OF AN ADDITIONAL SESSIONS JUDGE.**

(Proposed amendment of sections 409 and 528 of the Code of Criminal Procedure, 1890.)

(6th December, 1920.)

I DISCUSSED this case with Mr. Duval¹ before the last session Home Department Proceedings of the Council, and was not Judicial, January 1921, Nos. 122-123. altogether-satisfied with the (Legislative Department unofficial argument in his note, but as the No. 1039 of 1920) questions raised seemed to necessitate a reconsideration of matters dealt with by the Committee of 1916 (which I had no time to do then), I directed the matter to be held over. I regret that it should have been so long delayed, but the question was not an urgent one.

I have now been through the papers at some length, but I do not propose to cumber a very small point by a long note.

The present proposals are summarised in Mr. Tonkinson's² note at page 2 :

- (1) is met by clause 42 of the Bill drafted by the Committee ;
- (2) I think it would be better to provide specifically for the transfer of appeals by a Sessions Judge to an Additional Sessions Judge. This might be done by the insertion of a sub-section to section 409 ;
- (3) I do not think that Sessions Judges should have power to withdraw cases or appeals from Additional Sessions Judges ; to give them this power would be to make the latter their subordinates judicially, which I think would be wrong. This was undoubtedly the view of the Committee with regard to Additional District Magistrates, and I think also with regard to Additional Sessions Judges

¹ Joint Secretary in the Legislative Department.

² Deputy Secretary in the Home Department.

INDEX

TO

NOTES AND MINUTES BY SIR GEORGE LOWNDES, K.C.S.I., K.C.

(References are to pages).

ACCUSED.—Tendering of evidence by, on his own behalf · proposed amendment of Section 342 of the Code of Criminal Procedure, 1898 ..	216, 279
ACQUITTALS—Appeal against	87
ACTING CHIEF JUSTICE.—See High Court ; Government of India Act, 1915.	
ACTING JUDGE.—See High Court ; Government of India Act, 1915.	
ACTIVE SERVICE—Case of soldiers reported missing on	295
ADDITIONAL SESSIONS JUDGES—With Civil Judicial functions, if within Section 98 and Schedule III of the Government of India Act, 1915 See Code of Criminal Procedure, 1893.	259
ADEN.—Operation of Martial law in,	6
ADVERTISEMENT.—Acquisition of a new surname by	102
ADVOCATE GENERAL OF BENGAL.—Consultation by the Government of India, position of, <i>vis-a-vis</i> the Government of India, Salary and fees of, discussion of the principal for the determination of ..	15 11
AGENT—Debts incurred by · liability of principal for	229
ALIENS—Exclusion of, other than subjects of Indian States, from franchise Naturalization and denaturalization of Right to declare alienage by infant on attaining majority . reciprocal right of denaturalising	38 330 235
ALIENS RESTRICTION (CONSOLIDATION) ORDER, 1914.—Section 22 of, only provides for seizure and not confiscation ..	177
ALI IMAM, SIR.—See High Court.	
ANCIENT MONUMENTS PRESERVATION ACT, 1914.—Monuments maintained by Government under the Act ..	227
APPEAL.—Against acquittals, 87. In criminal cases in India their rationale Necessity of consulting the law officer before presentation .. See Code of Criminal Procedure, 1898 ; Privy Council.	132 266.
ARBITRATION.—Reference to, constitute a binding Contract as between the parties	192
ARJUN LAL.—Transfer of convict from Jaipur State to British territory ..	168
ARMS ACT, 1878.—Desirability of having a self-contained set of rules under, for Berar,	208

ARMY ACT—Construction of Section 180 (2) (d) of	82
Section 177 of, interpretation of the expression “any law of India”	275
ARREST.—Under section 54 of the Code of Criminal Procedure, judgment of Mr. Justice Chaudhuri of Calcutta High Court in the matter of,	100
BANK.—Exemption of deposits in, from income-tax	45
BAR.—Question of creating an Indian Bar	297
Reservation of Judicial posts for members of	281
BARNES, SIR GEORGE.—Memorandum of re import and export duties	233
BARODA STATE—Kalambandi rights in,	90
BASRA.—Administration of	139
BENGAL REGULATION III OF 1818.—State prisoner issue of a fresh warrant at each transfer of	314
BENGAL TOWN-PLANNING BILL.—Appointment of arbitrator	325
Clause 30 (3) of the Bill, no right of appeal to the “Court”; saving of the High Courts’ powers of revision	325
Saving of the High Courts’ powers of revision	325
BERAR.—Allocation of revenues to the Central Provinces Government; position of Governor as to authorising expenditure only necessary for Berar; proposed amendment of section 72-D of the Government of India Act	358
Desirability of having a self-contained set of rules for, under Arms Act	208
BHUTAN.—British Indian subjects committing offence in, triable by Bhutanese authorities	57
BILL.—Bar of statutory or constitutional right to consider, where necessary sanction of the Governor General has been refused,	8
BISHOPS.—Of Bombay and Madras; Conferment of extra diocesan powers on, limitations of His Majesty’s Letters Patent	245
BOMBAY PLEADERS BILL—Examination of, with reference to sections 106 and 107 of the Government of India Act, 1915	339
BORSTAL INSTITUTIONS.—See Madras Children Bill	
BRITISH BALUCHISTAN—See Matrimonial causes.	
BRITISH COURTS.—Question of jurisdiction of over Cargo of Foreign State temporarily landed in British India	105
BRITISH FLAG.—Flying of, by vessels owned by Native States; interpretation of Sections 63, 73 (1) and 734 of the Merchant Shipping Act, 1894	256
BRITISH NATIONALITY AND STATUS OF ALIENS, ACT, 1914.—Draft Bill to amend	235
Points for consideration by the Indian representatives to the Imperial Conference	235

BRITISH SUBJECT.—Meaning of the expression, in Tibet Trade Regulations, 1908	81
Right to tax wherever resident	23
BURMA.—See Financial Commissioner.	
BURMA FINANCIAL COMMISSIONER'S ACT, 1888 —See Financial Commissioner, Burma.	
BUSHIRE.—Customs and postal receipts collected in, during British occupation, Persian Governments' claim for	106
CASH CERTIFICATES.—Question of legislation to make them non-transferable	163
CENTRAL INDIA.—Pindara Jagirs in, whether British or Gwalior territory	92
CENTRAL INDIA EXCISE LAW.—Proposed enactment of — to replace the existing Mhow, Nimach and Nowgong Excise Law 1898 and the Indore Residency Bazaaris Excise Law 1904	110
CENTRAL PROVINCES.—Judicial Commissioner's Court in, jurisdiction of to try European British subjects	30
Desirability of converting the same to a Chief Court	31
Raising of the status of the Judicial Commissioner's Court in	113
CENTRAL PROVINCES COURTS ACT, 1904 —Desirability of amending, with a view to empowering the Judicial Commissioner's Courts to pass sentence of death on European British subjects	30
CHAKRATA CANTONMENT.—Levy of license fees in the form of taxes in : question of legality	261
CHAKRATA CANTONMENT LAW —See United Provinces Municipalities Act, 1900.	
CHAMBER OF PRINCES.—Significance of the institution	372
CHAUDHURI, MR. JUSTICE.—Judgment of, <i>re</i> arrest under section 54 of the Code of Criminal Procedure, 1898	100
CHAWKRI.—Thikana of, question of succession to.—See Jaipur State.	
CHIEF.—See Prince or Chief.	
CHIEFSHIP IN NATIVE STATE.—See Native State.	
CHILDREN BILL.—See Madras Children Bill.	
CIVIL ANNUITY FUNDS.—See East India Annuity Funds Act, 1874.	
CLERGYMAN.—Letters of Ordination : seal of	344
See Curacy ; Diocese.	
CODE OF CIVIL PROCEDURE, 1908.—Determination of the question whether a particular person is a ruling chief for the purposes of	315
See Phulera, Khan of.	
CODE OF CRIMINAL PROCEDURE, 1898.—Amendment of Chapter IX with a view to inclusion of the Indian Defence Force, Naval Forces and the Royal Air Force	304
Appeals—transfer from file of a Sessions Judge to that of an Additional Sessions judge	375

Proposed amendment of Sections 409 and 528	375
Question of judicial relation between a sessions judge and an additional sessions judge	375
Application of Sections 128 and 130 to members of the Indian Defence Force.	152
Arrest under Section 54 of, judgment of Mr. Justice Chaudhuri of Calcutta High Court in <i>re</i> , ..	100
Confiscation order Court Martial passed by in Mesopotamia, if enforceable in British India under, ..	210
Examination of the provisions of Sections 185, 526 and 527, as regards transfer of cases from one High Court to another	236
Examination of Sections 12 (1) and 177 <i>re</i> . jurisdiction of a Sub-divisional Magistrate	1, 2
Section 86 of, recommended amendment	
Section 29 of, use of—question of action in regard to Egypt. . .	215
Section 464 (1) of—rejection of proposal to amend	5
Examination of Medical officers under	5
Section 402 of—interpretation of ..	293
Section 401 of — application in respect of sentences	203
Sentences passed under—power of Governor General in Council to revise	132
Section 517 of—question whether a Court Martial can pass orders under, ..	210
Question whether Courts-Martial have powers of ordinary Criminal courts under,	210
Section 537 of—proposal to bring “misjoinders” under the purview of,	187
Section 342 of—proposed amendment regarding evidence to be given by an accused person on his own behalf	216, 217
COGHLAN, JAMES.—Discharge from lunatic asylum	27

INDEX.

v

COLONIAL PRISONERS REMOVAL ACT, 1884.—Sending a prisoner or criminal lunatic to England under ..	27
COLVIN.—Sir Elliot, on succession to the Thikana of Chawkri in Jaipur State— <i>See</i> Jaipur State.	
COMMUNICATIONS TO THE SECRETARY OF STATE.— <i>See</i> Local Government.	
CONFISCATION.—Whether the State has inherent power of,	7
Over property belonging to deserting soliders	17, 18
CONSTRUCTION.—Of references to repealed statutes subsequently re-enacted by a new statute	241
CONTRACT.—Barring acceptance of appointment after termination of non-pensionable engagement; position under Indian Contract Act, 1872	248
Co-OPERATIVE SOCIETIES.—Investment in, of trust funds held by Government	349
Whether can be treated as companies within the definition of the Land Acquisition Act, 1894	47
Question of legislation for the inclusion of, in the definition of Company in the Land Acquisition Act, 1894	48
COURT MARTIAL.—Confiscation order passed by, in Mesopotamia if enforceable in British India, under the Code of Criminal Procedure, 1898	210
Whether can pass order under Section 517 of the Code of Criminal Procedure, 1898	210
COURTS —Jurisdiction of—in respect of suit against a Prince or Chief ..	341
CRIMINAL CASES.—Power of revision by High Court—if can be affected by local legislatures	280
CRIMINAL COURTS —Jurisdiction in respect of rulers of Indian States—Case of Maharaja of Kolhapur	368
CRIMINAL LUNATIC.—Discharge of— question of releasing	27
CRIMINAL TRIBES.—Moradabad and Meerut Sections: suggested separate re-notification of	317
CRIMINAL TRIBES ACT, 1911.—Examination of Section 15 of	317
CURACY.—Taking up of a new, by clergyman: license for	
DAMS.—Measures for public safety against failure of — Protection of British interests in Indian States	371
DEATH.—Payment on—to legal representative. <i>See</i> Metropolitan in India.	
DEKKHAN AGRICULTURISTS, RELIEF ACT, 1879.—Proposed repeal of ..	147
DENATURALIZATION.— <i>See</i> Aliens; Naturalization.	
DESERTER.—Confiscation of property of	17, 18
Production of evidence against, in confiscation proceedings ..	18
DESPATCH.—Signing of, by a dissenting member	160
DIOCESE.—License of clergyman going into new	344
<i>See</i> Bishops.	

DISSENT.—Minute of—in Governor General's Executive Council, procedure in respect of recording etc.,	160
DIVORCE DECREES.—Passed by Indian Courts: recognition by English Courts	370
DIVORCE JURISDICTION.—See Matrimonial Causes.	
EASEMENT.—Acquisition of—by Government under the Land Acquisition Act, 1894	323
EAST INDIA ANNUITY FUNDS ACT, 1874.—Position of Civil Annuity Funds under	248
Grant of statutory rights of pension under	248
ECCLESIASTICAL AUTHORITY.—See Letters Patent.	
EGYPT.—Summons from, Service in British India: question of reciprocal service	215
EGYPTIAN COURT.—Decree of, if enforceable by execution proceedings in British India	265
ELECTION AGENT.—See Electoral Rules.	
ELECTORAL RULES.—Declaration under rule 11 (2) appointing election agents. exemption from Stamp duty	374
ENEMY COUNTRIES.—Imports from: restriction on,	233
ENEMY CRAFTS.—Retention and use of, without decree of Prize Court, if prejudice Imperial interests after war, discussed,	19
ENEMY SUBJECTS.—Civilian, whether prisoners of war while interned in India	176, 178
ENEMY TRADING ORDER.—Validating of. question of amending the General Clauses Act, 1897	260
ENGLISH STATUTE.—Repealed, Construction of references to, in an Indian Act, in certain circumstances	32
ESTOPPEL.—Law of essentials of application	194, 195
EUROPEAN BRITISH SUBJECTS.—Jurisdiction to try, by Judicial Commissioners Court	30
EXAMINATION.—Of medical officers under section 464 of the Code of Criminal Procedure 1898, undesirability of dispensing with	5
EXECUTIVE COUNCIL OF GOVERNOR GENERAL.—Conditional or temporary Successor of a member	
Salary of	347
Consideration of draft despatch in	160
Procedure in case of disagreement, among members	160
Form of order in, where a members dissents	160
Members of, taking of oath of secrecy by	155
Service qualification for appointment to. Cases of Sir Sankaran Nair and Sir James Meston	214

Signing of despatch by dissenting Member ..	160
Vacancy in office caused by departure of Member for England :—Case of Sir James Meston :—need of amending the Government of India Act, 1915 ..	318
EXECUTIVE GOVERNMENT.—Functions of, in relation to the sentences passed by Courts	132, 133
EXPORT DUTY.—Imposition of, on Indian raw products .. .	233
EXTRADITION.—Dealings between the Government of India and the Native States	25
Prosecution and conviction of extradited persons for separate offences	111
Treaties with Native States	111, 112
Consideration of Fugitive Offender's Act, 1881	112
FINDER.—See Indian Treasure Trove Act, 1878 ..	
FINANCIAL COMMISSIONER OF BURMA.—Question of jurisdiction of local Government over the decision of examination of the provisions of section 3 of the Burma Financial Commissioner's Act, 1888 ..	252
FISHERY LEASES.—Oral agreements in certain	107
FLAGS.—Use of, on ships owned by Native States in high seas	23
FOREIGNER.—See Foreigners Act, 1864.	
FOREIGNER'S ACT, 1864.—Definition of "foreigner". Anomaly arising under	109
See Native States.	
FOREIGNERS ORDINANCE.—See Native States.	
FOREIGN JURISDICTION ORDER IN COUNCIL, 1902.—Powers of Government of India under, unaffected by legislative restrictions imposed by the Government of India Act,	70
FOREIGN STATE.—Cargo of, temporarily landed in British India, whether subject to British municipal Law	105
FORFEITURE.—Proposed, of the property of Thakur Gopal Singh of Kharwa ..	58
FORFEITURE ACT, 1857.—Confiscation of property belonging to deserting Soldier	17
FUGITIVE OFFENDERS ACT, 1881.—See Extradition.	
GENERAL CLAUSES ACT, 1897.—Definition of "offences"	253
proposed amendment of Section 8,	33
Section 30 of "re-enacting" of Ordinance within the meaning of	213

GIPSY TRIBES.—In the United Provinces. Application of “restriction order” and “settlement order” in respect of ..	274
GOPAL SINGH.—Thakur, claim to the Thikana of Chawkri	
<i>See</i> Jaipur State.	
GOVERNMENT OF INDIA ACT, 1915.—AMENDMENT OF SECTION 33.—Authority of Viceroy to deal with certain classes of cases relating to Indian States independently of his Council ..	356
Appointment of acting judges of High Court · relation between the relevant provision of section 105 (2), and section 101 (4). ..	61
Construction of Section 79 (3) of, as regards previous sanction of Governor General <i>re</i> Legislation affecting Hindu law ..	352
Construction of Section 86, of as regards limitation of period of leave under the Section. ..	228
Construction of Section 90 <i>re</i> rank and precedence of the Governors ..	316
Examination of the provisions of Section 79 (2), <i>re</i> previous sanction of the Governor General to introduction of certain local Bills ..	142
Examination of Section 79 (4) in its bearing on section 106 of.. ..	294
Interpretation of Section 105 of, <i>re</i> acting judge and acting Chief Justice of High Court ..	61
Interpretation of Section 119 of ..	319
Power of His Majesty under Section 115 of, to prescribe by Letters Patent functions and jurisdiction to be exercised by Bishops of Madras and Bombay. ..	245
Power of legislation for all servants of the Crown, under section 65 (1) (b) ..	242
Provisions of Section 30 of leasing of a building for a Post Office in Native State ..	262
Section 65: powers of extra-territorial legislation ..	273
Section 98 and Schedule III of: consideration of the position of the additional Sessions Judges with civil judicial functions ..	259

GOVERNMENT OF INDIA ACT, 1919 —Amount of salary permissible to a conditional or temporary Successor of a member of the Executive Council · construction of Section 92 (4)	347
Appointment and interpretation of acting Chief Justice and acting judge under section 105 of	61
Powers of the Government of India under Section 32 (2): decision of Privy Council in <i>Moment Case</i> : need for necessary validation by Parliament	286
Power to prescribe procedure under Section 45 (1), — for communication by Presidency Government to the Secretary of State . . .	360
Proposed amendment of Section 72-D	358
Proposed draft of Schedule III appointment of Secretary and Deputy Secretary in the Legislative Department from the Indian Civil Service or otherwise; reservation of judicial posts for members of the Bar; recommendations of the Public Services Commission; Sir George Lowndes' minute of dissent ..	281
Proviso to Section 96-B. (2): grant of compensation to Mr. C. G. Todhunter	359
<i>See</i> Bombay Pleaders Bill.	
GOVERNMENT SOLICITOR —Reference from the advice of, to the Advocate General,	173
<i>See</i> Solicitor to the Government of India.	
GOVERNOR GENERAL.—Exercise of prerogative to pardon convicted persons.	40
GOVERNOR GENERAL IN COUNCIL.—Power of revising sentence under Section 401 of the Code of Criminal Procedure,	40
GOVERNOR GENERAL'S EXECUTIVE COUNCIL.— <i>See</i> Executive Council .	
GOVERNOR'S.—Warrant of precedence; rank <i>inter se</i> ; interpretation of Section 90 of the Government of India Act	316
GULF OF MANAAR — <i>See</i> Territorial Waters.	
HAGUE OPIUM CONVENTION —Steps to be taken to bring the Law and regulation in India into conformity with ..	355
HAGUE REGULATIONS.—Article 4 of, question whether Civilian enemy subjects interned in India are prisoners of war within the meaning of	176
HIGH COURT.—Appointment of acting judges. <i>See</i> Government of India Act, 1915. ..	

Judgeship in power of Local Government to fill casual vacancies—Question of appointing a temporary successor to Sir Ali Imam	276
Power of revision of Criminal Cases: if local legislature can affect	280
Question of competing prosecutions in ; right of decision as to jurisdiction to try	236
Question of conferring additional power on, by—Local Government	294
Retired Judges practising by	361
Transfer of case from one to another whether within or outside the province	236
<i>See Travancore.</i>	
HINDU LAW.—Interpretation of, as referred to in the <i>Sanads</i> : view of Brandreth	334
Previous sanction of Governor General to Legislation affecting: construction of Section 79 (3) of the Government of India Act, 1915	352
HOSTILE FIRM.—Interpretation of and power to wind up	79
Liquidation of, 35, barring of post-war claims in connection with	165
Reconstruction of Ernsthausen's Indian business	135
Indian Companies (Foreign Interests) Act, 1918	
HOUSE OF LORDS.—Proposed amalgamation of, with the Judicial Committee into one Imperial Court of Appeal	257
ILLEGAL ACTS.—Liability of Government for — committed under its orders. Question as to action taken by Government in the Punjab under — Martial Law and Indemnity Act, 1919	335
IMMOVEABLE PROPERTY.—Acquisition of, under the Land Acquisition Act, 1894, for a private institution:—Question of legality or otherwise	320
IMPERIAL CONFERENCE.— <i>See</i> British Nationality and Status of Aliens Act.	
IMPERIAL COURT OF APPEAL.— <i>See</i> House of Lords, Judicial Committee.	
IMPORTS.—Restriction of, from enemy countries	233
IMPORT AND EXPORT DUTIES.—Criticism of Sir George Barnes' memorandum	233
INCOME-TAX.—Exemption of allowance of Nawab Bahadur of Murshidabad from,	205
Exemption of Bank deposits from	45
Question of exemption of officers of the Royal Indian Marine under Section 6 (1) (i) of the Indian Income-tax Act, 1918	292
INCOME-TAX ACT, 1886.—Making a return of one's income under Part IV of, not obligatory,	45

INDEMNITY ACT 1919.—Question as to action taken by Government in the Punjab under Martial Law and —	335
INDEMNITY LEGISLATION.— <i>See</i> Martial Law ; war legislation.	
INDIAN APPEALS.—Constitution of Committee for	257
INDIAN ARMY ACT, 1911.—Proposed amendment of,	211
Proposed amendment of Section 116 with reference to the case of soldiers reported missing on active service	295
INDIAN CONTRACT ACT, 1872.—Section 56 of the Act and analogous provision in the English law	267
INDIAN DEFENCE FORCE.—Application to Members, of Sections 128 and 130 of the Code of Criminal Procedure	152
Dispersing an unlawful assembly by Members of	152
Duties and liabilities of Members, discussed ..	152
<i>See</i> Code of Criminal Procedure, 1898.	
INDIAN FACTORIES ACT, 1911.—Railway Workshops with Mechanical or electrical power are factories within the meaning of	326
INDIAN INCOME-TAX ACT.—Place where income accrues for purposes of taxation under	232
Question whether Royal Indian Marine Officers are entitled to exemption under Section 6 (1) (i)	292
INDIAN LIMITATION ACT, 1908.—Proposed amendment of Article 179 ..	197
INDIAN LUNACY ACT, 1912.—Provisions of Section 98 of, <i>re.</i> detention of lunatic prisoners	77
INDIAN MARINE SHIPS —If are ships "belonging to Her Majesty" ..	239
INDIAN MERCHANT SHIPPING ACT, 1859.—Construction of the expression "lascar or other native Seamen" in Section 115.. ..	240
INDIAN MERCHANT SHIPPING ACT, 1883 —Proposed amendment of ..	289
INDIAN MERCHANT SHIPPING ACTS, 1859 AND 1883.—Liability of Agent, Master and Shipping Master under ..	302
INDIAN NATURALIZATION ACT, 1852.—Certificate of naturalization under, as conferring immunity from the provisions of the Foreigners Act, 1864	
Case of <i>Mme. Moli</i> , possible restriction of the provision to the cases of the natives of the East	209
INDIAN PENAL CODE.—Proof of treason or offence under Section 121, of, necessary for adjudging forfeiture against deserter ..	17, 18
INDIAN POST OFFICE ACT, 1898.—Position of British Post Offices in French territory in Madras under	273

INDIAN PRESS ACT, 1910.—Securities deposited under effect of the Royal Amnesty Proclamation on .. .	348
INDIAN RAILWAYS ACT, 1890.— <i>See</i> Railway Workshops	
INDIAN RAW PRODUCTS — <i>See</i> Export duty.	
INDIAN REGISTRATION ACT, 1916.—Proposed amendment of : duties of Sub-registrars .. .	9
INDIAN STATES.—Protection of British interests against dangerous structures in —. Failure of dams and reservoirs in — .. .	371
INDIAN STATES.—Rulers of jurisdiction of Criminal Courts in respect of Case of Maharaja of Kolhapur .. .	308
Subjects of, not to be deemed aliens for purposes of municipal franchise .. .	38
INDIAN TREASURE TROVE ACT, 1878.—Interpretation of the term "finder" under .. .	196
INDORE RESIDENCY BAZAARS EXCISE LAW, 1904.—Replacement of, by a single Central India Excise Law	110
INNS OF COURT.—Proposed restrictions on Indian students seeking admission into .. .	297
INSOLVENCY LAW.— <i>See</i> Native States	
INTERNED CIVILIANS.— <i>See</i> Prisoners of War.	
INTERNED ENEMY SUBJECTS — <i>See</i> Hague Regulations.	
INTERPRETATION ACT, 1889.—Interpretation of Section 32 of, with reference to Section 105 of the Government of India Act, 1915 .. .	61
IRAQ COURTS —Reception of prisoners under warrant from .. .	78
JAIPUR COURT.—Transfer of convict Arjun Lal from, to British Court .. .	168
JAIPUR STATE.—Thikana of Chowkri : claim of Thakur Gopal Singh for succession to, Sir Elliot Colvin on ; law of arbitration and estoppel .. .	192, 194, 195
JUDICIAL COMMISSIONER'S COURT.—Jurisdiction to try European British subjects .. .	30
JUDICIAL COMMITTEE —Proposed amalgamation of, with the House of Lords into one Imperial Court of Appeal .. .	257
JUNAGADH STATE.—Appeal against conviction of Parshotam Rai Zala of, .. .	119
JURISDICTION.—Cession of, over certain portions of the North-Western Railway and of the Rajputana-Malwa Railway, .. .	83
Interpretation of the local limits of, in the case of a Sub-divisional Magistrate, .. .	1
Of Courts in respect of suit against a Prince or Chief .. .	341
Of Courts outside British India to commit prisoners to British Indian Jails, .. .	78
Question of, in respect of cargo of foreign State temporarily landed in British India .. .	105
KALAMBANDI.—Rights of, in the Baroda State and Rewa Kantha .. .	90

KARIKAL.—*See* Kauvery.

KAUVERY.—Irrigation by the waters of; proposed connection between the French Colony of Karikal and the Madras Government, in respect of 179

KEONTHAL STATE.—Deed of cession from, in respect of certain lands for railway purposes 277

KHARWA.—Cancellation of the sanad of Thakur Gopal Singh, 58

KING'S COUNSEL.—Question of making Indian King's Counsel 298, 342

LAHORE HIGH COURT.—*See* Letters Patent.

LAND ACQUISITION.—Granting of *solatium* in the case of, 181

LAND ACQUISITION ACT, 1894.—Acquisition for Companies by Government.. 37

Interpretation of sections 40 and 41 of, .. 154

Question of treating Co-operative Societies as companies within the definition of, .. 47

See easement; Immoveable property.

LAND REVENUE.—Question whether rent or tax, 115

LASCARS.—Supply of warm clothings, etc, to, 140

See Indian Merchant Shipping Act, 1859.

LEFROY, BISHOP.—*See* Metropolitan in India.

LEGAL REPRESENTATIVES, PAYMENTS TO.—*See* Metropolitan in India.

LEGISLATION.—Retrospective effect of question of retrospective application of the provisions of the Provident Funds Act, 1897 .. 271

See Mysore Legislative Council

LEGISLATIVE COUNCIL.—*See* Mysore Legislative Council, Travancore.

LEGISLATIVE COUNCIL OF THE GOVERNOR GENERAL.—Review of the proceedings of, for the year. . 238

Voting in, by Government officials, discussion of principle .. 238

LEGISLATIVE DEPARTMENT.—Appointment of the Secretary and Deputy Secretary in,—*See* Government of India Act —proposed draft of Schedule III.

LETTERS PATENT.—King's ecclesiastical authority under; scope of, as to the conferment of jurisdiction and functions on Bishops of Madras and Bombay 245

Proposed draft of, creating a High Court in Lahore .. 268

LICENSED TANK.—Oil stored in, liability of, to enhanced tariff rate, unless sooner removed 75

LOCAL BILL.—Previous sanction of the Governor General to the introduction of, 142

LOCAL GOVERNMENT.—Communication from, to the Secretary of State powers of the Government of India in regard to: right of Presidency Governments to communicate direct power of the Government of India to prescribe procedure under section 45 (1) of the Government of India Act 360

If can confer additional power on a high court, .. 294

LOCAL LEGISLATURES.—Whether can affect high court's power of revision of Criminal cases,	280
LUNATIC.— <i>See</i> Criminal lunatic.	
LUNATIC ASYLUMS.—Reception and detention of lunatics from Native States,	56
MADRAS.—Oral agreements in certain fishery leases in	167
MADRAS CHILDREN BILL.—Refusal of sanction to introduce	108
Consideration of Borstal institutions, Code of Criminal Procedure and Reformatory schools Act, 1897, in connection with	108
MADRAS HINDU LIMITED OWNERS BILL.—Previous sanction of the Governor General to,	96
MADRAS TOWN PLANNING BILL.—Discussion of the provisions of, ..	41
MAHARAJA OF KOLHAPUR.— <i>See</i> Indian States.	
MAHARAJA OF TRAVANCORE.— <i>See</i> Travancore.	
<i>Mare Clausum</i> .— <i>See</i> Territorial Waters.	
MARTIAL LAW.—Acts declared as offences by Martial Law authorities, if offences under the Code of Criminal Procedure, 1898	293
In the Punjab, necessity of Indemnity Act	286
Operation of, after the cessation of a State of war, ..	6
Question as to action taken by Government in the Punjab under—and Indemnity Act, 1919, Liability of Government for illegal Acts committed under its orders	335
Question of enhancing sentence passed under,	6
Martial Law commissions; Privy Council appeal of certain persons sentenced by	308
MARTIAL LAW COMMISSION.— <i>See</i> Martial Law.	
MATrimonIAL CAUSES.—Trial of, by young officers	365
Proposed withdrawal of local divorce jurisdiction from British Baluchistan and Quetta, ..	365
MAXIMUM PRICE.—Proposed Ordinance to control	188
MEDICAL OFFICER.—Examination of, under section 464 of the Code of Criminal Procedure, 1898	5
MERCHANT SHIPPING.—English law of, whether applicable or not in the case of vessels not registered in the United Kingdom, ..	190
MERCHANT SHIPPING.—Law relating to, consolidation of,	145
MERCHANT SHIPPING ACT, 1894.—For future of, Native State owned ship under, flying British flag	23
<i>See</i> British flag.	
MESOPOTAMIA.—Retention and use of enemy crafts captured in	19
Turkish notes in, after British occupation	86
MESTON, SIR JAMES.— <i>See</i> Executive Council.	
METROPOLITAN IN INDIA.—Payment of six months' salary to legal representative on death: the case of the late Bishop Lefroy	319

MINUTE OF DISSENT.—By Sir George Lowndes, to paragraph 13 of the Despatch <i>re</i> draft of Schedule III of the Government of India Act,	281
<i>See</i> Dissent.	
" MISJOINDERS." —Proposal to bring within the purview of section 537 of the Code of Criminal Procedure,	187
MME, MELL.— <i>See</i> Indian Naturalization Act, 1852.	
MOGUL STEAM SHIP CASE.—Judgement in, <i>re</i> the question of rebate agreements.	166
MOMENT CASE.— <i>See</i> Government of India Act ; Secretary of State.	
MOON, MR. A. J.— <i>See</i> Provident Fund.	
MUNICIPAL FRANCHISE —Exclusion of aliens from,	38
MUNICIPAL LAW —Public property of foreign State in British India not subject to,	105
MURSHIDABAD —Nawab Bahadur of, exemption of the allowance of, from income-tax and Super-tax,	105
MYSORE LEGISLATIVE COUNCIL.—Legislation by, submission of new law to Resident before Maharaja's assent,	328
NABHA STATE.—Cession of jurisdiction over certain portions of the North-Western Railway and of the Rajputana-Malwa Railway in,	83
NAIR, SIR SANKARAN.— <i>See</i> Executive Council.	
NATIVE SEAMAN.— <i>See</i> Indian Merchant Shipping Act, 1859.	
NATIVE STATES —Entradition arrangements with consideration of the terms of the Fugitive Offenders Act, 1881	25, 112
Insolvency law and procedure for	66
Power of legislation for servants of the Crown in, question whether power is exclusive or concurrent with the rights of	242
Question of leasing a building for a Post Office in; provisions of Section 30 of the Government of India Act, 1915	262
Reception and detention in British Lunatic Asylums of lunatics from	56
Status of Chiefship in; recognition by British Government as a condition essential to	167
Subjects of: if are foreigners within the meaning of the Foreigners Act, 1834 and of the Foreigners Ordinance, 1914	251
Use of flag by, on high seas	256
Vessels owned by: flying of British flag by	256
NATURALIZATION.—Right to declare alienage by naturalized infant on attaining majority reciprocal right of denaturalizing	235
<i>See</i> Aliens ; Indian Naturalizing Act, 1852.	
NAVAL FORCES.— <i>See</i> Code of Criminal Procedure, 1898.	
NEGOTIABLE INSTRUMENTS.— <i>See</i> Transfer of property Act, 1882.	

OATH.—Taking of, by Members of Governor General's Executive Council ..	155
By Officials appointed from England under the Government of India Act	155
OPIMUM.— <i>See</i> Central India Excise Law.	
<i>See</i> Hague Opium Convention, 1912.	
ORDINANCE —“Re-enacting” of, within the meaning of section 30 of the General Clauses Act, 1897	213
Superseded by Act. validity of rules made under .. .	260
“Re-enacting” of	214
ORDINATION.— <i>See</i> Clergyman.	
PALK STRAITS — <i>See</i> Territorial waters	
PANCHAYATS —Criminal cases decided by, High Court's power of revision ; local legislatures power to affect case of Allahabad High Court	280
PANCHAYAT COURTS —Question of jurisdiction, limitation and rule of evidence	244
PARDON.—Power to exercise, by the Governor General conditional pardon .	40
PATENT LAW.—Disclaimer in : insertion of, by consent of Parties	264
PENSION.— <i>See</i> East India Annuity Fund Act, 1874.	
PERSONAL LAW.—In regard to marriages and mixed marriages	63
Validity of mixed marriages contracted in contravention of ..	65
PHULERA.—Khan of, his Status,	49
Desirability of amending Section 86 of the Code of Civil Procedure, re the status of,	49
PINDARA JAGIRS.—In Central India, question whether British or Gwalior territory	92
<i>See</i> Central India.	
PORTUGUESE ARMY.—Desertion from, if an offence within the General Clauses Act, 1897	253
POST OFFICE CASH CERTIFICATES.— <i>See</i> Cash Certificates.	
POST OFFICES.—British — in French territory in Madras	273
PRECEDENCE.— <i>See</i> Warrant of —	
PREROGATIVE.—Discussed as distinct from statutory power, Exercise of, by the Governor General	132
Question of granting conditional pardon	40
PRE-TREATY LIQUIDATIONS.—Disposal of the proceeds of —	364
PRINCE OR CHIEF.—Suit against — jurisdiction of Courts	341
PRINCIPAL.—Liability of — for debts incurred by agent	229
PRISONERS.—Conveyance through British territory of — arrested under French authority	84
Internment of war prisoners in British India	50
Reception of — in British Indian jails, from Courts outside British India. Necessity of amending Indian Act to ensure compliance	78

PRISONERS ACT, 1900.—Interpretation of the word "Court" in Section 3 of —	78
PRISONERS OF WAR.—Whether interned civilians are: recoupment of maintenance charges of interned civilians	353
PRIVATE INSTITUTION.—Acquisition of immoveable property for — by Local Government under Land Acquisition Act, 1894	320
Question of legality or otherwise	307
PRIVY COUNCIL.—Appeal to — generally	307
Appeal — to by certain persons	
Appeal to — printing of records in connection with — opinions of High Courts. Substituting legal representatives of a deceased party in period of limitation for ..	197
Persons sentenced by martial Law Commissions	308
High Courts' power to refuse leave to appeal in cases where no substantial question of law is involved	307
Delays in Indian appeals to —	68
Preparation of records in appeals to —	68
PRIZE COURTS.—Condemnation by, — of prize ships, necessary to safeguard Neutral interests	19
Decree of—necessary for prize] ship to become property of Captor, where decree not essential	19, 20
If can be established in occupied territory, provisions of the — Act of 1894	21
PRIZE SHIP.—Captors' obligations to bring under adjudication effect of failure	21, 22
See Enemy Craft.	
PROCLAMATION.—Issued to the Governor General when he assumes his office	
Exercise of Royal Prerogative under	
PROMISSORY NOTES.—Negotiability of — different position with regard to cash certificates	163
PROVIDENT FUND.—Assignment of money in, — Case of Mr. A. J. Moon	180
disposal of money under —, of the late Mr. W. H. Sharp. Rules re, — discussion of —	170, 171
Power of deposition to deal with the deposit by will —	172
Power of Muhammadan depositor to make nomination contrary to Muhammadan Law of inheritance	172
PROVIDENT FUND ACT, 1897.—Deposit under — proposal to increase the limit	362
Retrospective application of the provisions of under Section 6 question re	271
PUBLIC SERVICE COMMISSION.—See Government of India Act proposed draft of Schedule III.	
QUETTA.—See Matrimonial Causes.	
RAILWAY RECEIPTS.—As instruments of title their transferability	220
RAILWAY WORKSHOPS.—Application to — of Section 83 of the Indian Railways Act, 1890 and of the provisions of the Indian Factories Act, 1911	326

REBATE AGREEMENTS.— <i>See</i> Trade.	
RECORDS.—Destruction of : rules regarding	324
REFORMS SCHEME.—Operation of : compensation for loss arising from : case of Mr. C. G. Todhunter of Madras Executive Council ..	259
RENT.—Question whether land revenue is,	115
RESERVOIRS.—Measures for public safety against failure of. Protection of British interests in Indian States	371
“RESTRICTION ORDER.”— <i>See</i> Gipsy tribes.	
RETIRED HIGH COURT JUDGES.— <i>See</i> High Court.	
RETROSPECTIVE APPLICATION OF LEGISLATION.— <i>See</i> Legislation.	
REVISION.—By Governor General in Council of Sentences	132
<i>See</i> High Court.	
REWA KANTHA.—Kalambandi rights in—	90
ROYAL AIR FORCE.— <i>See</i> Code of Criminal Procedure, 1898.	
ROYAL AMNESTY.—Effect of, on securities deposited under the Indian Press Act, 1910	348
ROYAL INDIAN MARINE.—Question of exemption of officers of, under section 6 (1) (i) of the Income-tax Act, 1918	292
ROYAL PREROGATIVE —Exercise of, by the Governor General	132
His Excellency the Governor General as the depository of—	40
When Privy Council recommends exercise of—	133
<i>See</i> Proclamation.	
RULING CHIEF.—Power of, to sue in British Indian Court	373
SEA CUSTOMS ACT, 1878.—Consideration of the application of section 19 of, question of dealing with objectionable University diplomas,	103
Warehousing under Section 37 of : question whether duty-paid oil stored under license in tank is warehoused under the provisions of the Act,	75
SEA-GOING VESSELS.—Supply of warm clothing, etc. to lascars in, ..	190
SECEROY.—Oath of, taking of by Viceroy,	175
SECRETARY OF STATE.—Communication to, by Local Governments. <i>See</i> Local Government.	
Right of Indian subject to sue : decision in Moment case	51
SENTENCES.—Revision of, by the Governor General in Council	132
SESSIONS JUDGE.— <i>See</i> Code of Criminal Procedure, 1898.	
“SETTLEMENT ORDER.”— <i>See</i> Gipsy tribes.	
SHARP, MR. W. H.—Disposal of G. P. Fund money at the credit of ..	170
<i>See</i> Provident Fund.	
SHIP BUILDING COMPANY.—Acquisition of land for,	154

SHIPPING MASTER.—See Merchant Shipping Acts, 1859 and 1883	
SIKKIMESE SUBJECTS.—To be treated as British Subjects for certain purposes,	81
SIMLA HOUSE ALLOWANCE.—Granted to Government of India establishment question of taxing	249
Sir Ibrahim Rahimtoola's Charities Registration Bill, previous sanction of the Governor General required to the introduction of, in the Bombay Legislative Council, ..	8
SIR COWASJI JEHLANGIR BARONETCY ACT, 1911.—Proposed amendment of, rejection of the proposal ..	4
SOLDIER.—Dying in active service will by—	174
See Indian Army Act, 1911.	
SOLICITOR TO THE GOVERNMENT OF INDIA.—Appointment of a wholetime officer	220
Consideration of the strength of the Superior Staff and the work done in the Legislative Department	225
Remuneration of, consideration of the question. .	15
Question of the appointment of a permanent wholetime Solicitor	15
See Government Solicitor; Solicitor to the Government of India.	
STAMP-DUTY.—See Electoral Rules.	
STATE PRISONER.—See Bengal Regulation III of 1818, State Prisoners Act, 1858.	
STATE PRISONERS ACT, 1858.—Removal of prisoner under section 5 of the Act	
STATUS.—question <i>re</i> under Section 86 of the Code of Civil Procedure ..	49
Judges to take judicial notice of status of a Foreign State	49
See Phulera, Khan of—	
STATUTES.—Repealed and re-enacted, Construction of reference, to ..	241
SUB-DIVISION.—Question of legality of appointing two Magistrates to the concurrent charge of	2
SUB-DIVISIONAL MAGISTRATE.—extent of jurisdiction through the whole district,	2, 3
Local limits of the jurisdiction of— ..	1
SUMMONS.—Reciprocal service of, between British India and Egypt ..	215
SUPER-TAX.—Exemption of the allowance of Nawab Bahadur of Murshidabad from	205
Question of liability of an executor or administrator as such ..	254
Refund to beneficiary of under Super-taxed estate where the share is below super-tax scale	254
SURNAME.—Acquisition of a new, by advertisement	102
TAX.—Question whether land revenue is	115

TERRITORIAL WATERS.—Limit of	185
Question of the extension of limit of for purposes of legislation	332
Whether Palks Straits and the Gulf of Manaar can be declared as <i>Maria Clausa</i>	333
TIBET TRADE REGULATIONS, 1908.—interpretation of the expression British Subject in	81
Treaties and Trade Regulations relating to treatment of Sikkimese subjects as British subjects for the purposes of,	81
THAKUR GOPAL SINGH.— <i>See</i> Kharwa.	
TODHUNTER, MR. C. G., —Grant of compensation to	359
TOWN PLANNING BILL.— <i>See</i> Bengal Town Planning Bill; Madras Town Planning Bill.	
TRADE.—Restraint of: whether rebate agreements constitute; Mogul Steam ship case.	166
TRANSFER OF PROPERTY ACT, 1882 —Section 137 of: transfer of negotia- ble instruments	327
TRAVANCORE.—High Court in: powers of the Maharaja	291
Legislative Council in: power of the Maharaja	291
TRUST.—Question whether property vested in a trustee vests in him per- sonally or <i>virtute officii</i>	290
TRUSTEE.— <i>See</i> Trust.	
TRUST PROPERTY.— <i>See</i> Trust.	
TRUST FUNDS.—Investment of, in Co-operative Societies by Government ..	349
TURKISH NOTES.—In Mesopotamia after British occupation,	86
UNITED PROVINCES.—Gipsy tribes in	274
UNITED PROVINCES MUNICIPALITIES ACT, 1900.—Repeal of: effect upon the Chakrata Canton- ment Law,	231
UNLAWFUL ASSEMBLY.—Dispersal of, by members of the Indian Defence force	152
VALIDATING ACT.— <i>See</i> War Legislation.	
VICEROY.—Proposed taking of oath by	155
WAREHOUSING.— <i>See</i> Sea Customs Act, 1878.	
WAR.—Liquidation of hostile firms in India during the continuance of ..	35
WAR LEGISLATION.—Question of passing validating and indemnity Act ..	286
WARRANT OF PRECEDENCE.—Place of Governors; their rank <i>inter se</i> ; cas- of Lord Willingdon on his transfer from Bombay to Madras	316
WILL.—Entry in the sheet roll of Indian soldier dying on active service whether can be considered valid,	174
WORKMAN'S BREACH OF CONTRACT ACT, 1859.—proposed amendment of ..	254
ZALA PARSHOTAM RAI.—Appeal against conviction of	119

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